1

Supreme Court, U.S.

001873 JUN 1 1 2001

OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

In the Matter of

B. Bruce Kittrell

No. 40896

A Member of the State Bar

Petition for a Writ of Certiorari to the California Supreme Court

---

B. BRUCE KITTRELL
A Professional Corporation
Suite 201
Airport Office Plaza
25200 Crenshaw Blvd.
Torrance, CA 90505

(310) 891-1190

Petitioner Attorney ***Pro Se***

231 pp

QUESTIONS PRESENTED

1. When an appellate decision admits there is insufficient evidence to support attorney misconduct culpability findings, may it order a second trial rather than issue a dismissal of the charges?
2. When a finding of culpability is based on a change in the noticed charge by the appellate court, does the finding of culpability of the new unnoticed charge violate fundamental due process of law?
3. In an attorney disciplinary proceeding, when an appellate court determines that there is an insufficiency of evidence to sustain the noticed charge, may it change the charge without notice, find culpability of the new charge, and remand to find facts to support the conclusion of culpability of the new charge?
4. In an attorney disciplinary proceeding, may collateral estoppel be applied to a Civil Court judgment whose merits were tried on a preponderance of the evidence standard when an attorney disciplinary proceeding requires proof by clear and convincing evidence with all intendments in favor of the accused attorney?
5. In an attorney disciplinary proceeding, may collateral estoppel be applied by claiming that a punitive damage award in the civil suit is *ipso facto* an act of moral turpitude?
6. Is not an "act of moral turpitude" as a professional responsibility violation, as applied to a civil lawsuit's punitive damage award based on unspecified malice, or oppression, or fraud, unconstitutionally vague?

PARTIES

B. BRUCE KITTRELL
A Professional Corporation
Suite 201
Airport Office Plaza
25200 Crenshaw Boulevard
Torrance, CA 90505

(310) 891-1190

Petitioner Attorney ***Pro Se***

MARIE M. MOFFAT
RICHARD J. ZANASSI
TRACEY L. MLODOZENIEC
Office of General Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105

(415) 538-2000

Respondent State Bar of California

TABLE OF CONTENTS

Questions Presented i
Parties ii
Table of Contents iii-iv
Table of Authorities v-vi

I. Introduction 1
II. Judgment Appealed 2
III. Jurisdiction 3
IV. Constitutional and Statutory Provisions 3
V. Statement of the Case 4
VI. The Admission that the Prosecutor Failed in his Burden of Proof Requires Reversal and Entry of an Order of Dismissal 8
VII. Is not the Finding of Culpability of a New Unnoticed Charge a Denial of Due Process of Law? 8
VIII. May Collateral Estoppel be Applied to a Civil Damage Award so as to Bar Defense of the Merits of an Attorney Disciplinary Proceeding? 10
IX. Is not an Act of Moral Turpitude Unconstitutionally Vague as Applied to a Civil Punitive Damage Award? 12
Conclusion 13

TABLE OF CONTENTS (APPENDIX)

A. California Supreme Court Order of March 14, 2001
B. Verified Petition for Review, California Supreme Court
C. Notice of Motion and Motion for Reconsideration of Opinion on Review
D. Review Department Order of State Bar Court of the State Bar of California in Bank
E. Opposition to Respondent's Motion for Reconsideration
F. Reply to Opposition to Motion for Reconsideration
G. Opinion on Review of the Review Department of the State Bar Court
H. Notice of Disciplinary Charges

TABLE OF AUTHORITIES

Cases:

Arizona v. Washington (1978) 434 U.S. 497, 503-505 8
Commissioner v. Sunnen (1948) 333 U.S. 591,601 11
Cromwell v. County of Sacramento 94 U.S. 351 11
In re Ruffalo (1968) 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 117 8,9
Lawlor v. National Screen Service (1955) 349 U.S. 322 11
Montana v. United States (1979) 440 U.S. 147 11
One Lot Emerald Cut Stones v. United States (1972) 409 U.S. 232 11
Partmar v. Paramount Corp. (1954) 347 U.S. 89 11
Southern Pacific R. Co. v. United States (1897) 168 U.S. 48-49 11
Smith v. Wade (1983) 461 U.S. 39, 59 13
Tait v. Western Md. R. C. (1933) 289 U.S. 620 10
United States v. International Building Co. (1953) 345 U.S. 502 10

United States Constitution:

Fifth Amendment 3
Fourteenth Amendment 3

United States Statutes:

28 U.S.C.A., section 1257 3

United States Supreme Court Rules:

Rule 10 3

TABLE OF AUTHORITIES (Cont.)

California Business and Professions Code:
Section 6106 .... 3, 6-7

American Bar Association Model Rules:
A.B.A. Model Rules, Rule 8.4, Misconduct, Comment, at 353 12

Books and Articles:
Carroll, Lewis, *Alice in Wonderland and Through the Looking Glass,* Harcourt, Brace, Chapters 11-12 4

UNITED STATES SUPREME COURT

In the Matter of

B. Bruce Kittrell

No. 40896

A Member of the State Bar

Petition for a Writ of Certiorari to the California Supreme Court

---

I.

Introduction

This petition presents the issue whether an attorney may be subject to a second trial on attorney disciplinary charges when the appellate level finds insufficiency of the evidence of the noticed charges following the first trial?

The second constitutional issue is whether culpability may be found when the appellate level changes the charge without notice or opportunity to be heard.

The third constitutional issue is whether the doctrine of collateral estoppel may be applied to the merits of a quasi-criminal attorney disciplinary proceeding based on a civil suit's punitive damage award so as to bar trial, notice, and rights to confrontation and cross-examination on the merits of a quasi-criminal disciplinary proceeding.

The fourth constitutional issue is whether the doctrine of collateral estoppel may be applied in an attorney disciplinary proceeding based on a civil suit whose merits were tried on a preponderance of the evidence burden of proof when the attorney disciplinary proceeding requires proof by clear and convincing evidence with all intendments made in favor of the accused attorney.

The fifth constitutional issue of importance is whether the California "act of moral turpitude" statute concerning attorney misconduct is unconstitutional for vagueness as applied to a punitive damage award in a civil law suit.

II.
Judgment Appealed

This is a Petition for a Writ of Certiorari to the California Supreme Court from its order dated March 14, 2001 summarily denying a petition for review of a published decision of the Review Department of the State Bar Court of the State Bar of California. Said denial is attached as Exhibit A. The published decision of the Review Department of the State Bar Court of the State Bar of California authored by a non-lawyer is attached as Exhibit B. Said decision finding culpability is hereinafter referred to as "the Opinion."

III.
Jurisdiction

Jurisdiction is founded on 28 U.S.C.A. Section 1257 as a petition from a decree of a State Supreme Court where the validity of a statute is drawn in question on the ground of its being repugnant to the Constitution of the United States, or where any right…is specially set up or claimed under the Constitution …of the United States.

Pursuant to Rule 10 of the Rules of the United States Supreme Court, subdivision (c) a state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

IV.
Constitutional and Statutory Provisions

Fifth Amendment: No person shall be… deprived of…liberty or property, without due process of law."

Fourteenth Amendment: No State shall… deprive any person of…. Liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Business and Professions Code section 6106: The commission of any act involving moral turpitude…. , whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes cause for disbarment of suspension.

V.
Statement of the Case

The four issues of constitutional import: the failure to dismiss the charges while acknowledging there is insufficient evidence to support the charges; the change in the charge at the appellate level; the application of collateral estoppel to bar the accused's defense of the charges; and the unconstitutionality of the act of moral turpitude statute as applied were raised at the appropriate levels within the state system as set forth herein.

As set forth in the Petition for Review filed with the California Supreme Court, "This is the classic example of Alice saying, 'What is the charge?' to which the Queen responds, "First the verdict, then the trial, and then the new charge." See Carroll, Lewis, Alice in Wonderland and Through the Looking Glass, Harcourt, Brace, Chapters 11-12.

The Review Department of the State Bar Court of the State Bar of California in a published decision authored by a non-lawyer found guilt of an unnoticed charge while admitting there was no evidence to support the noticed charges, then remanded to find the facts to support its guilt finding already made, and it did so by purporting to change the charge from that which was noticed to anything that can now be made up. First, the verdict, then the trial, and never a specific or known charge. Refer Exhibit B.

The attorney is an attorney at law for thirty-four years. He has no disciplinary record. He is a real estate broker for twenty years. One of his real estate companies offered real estate investments. He suffered a civil court judgment. The judgment was based on the failure of an investment in a real estate deed of trust. The deed of trust investment was offered by one of the respondent's real estate companies. The plaintiff was not a client of the attorney. The plaintiff sought out the petitioner as an investor. She invested monies and the investment failed. The civil lawsuits' merits were tried on a preponderance of the evidence burden of proof. The punitive damage instruction was based on clear and convincing evidence. The punitive damage instruction permitted a finding based on malice, or fraud, or oppression without specification as to what was the ground relied on by the jury in imposing such damages.

The merits of the fraud cause of action were based on an instruction, which permitted a finding of fraud based on a reckless statement having been made. The jury split nine to three on the fraud cause of action with three jurors finding no fraud. The legal malpractice count was based on a jury instruction which permitted a finding based on whether a person sought legal advice even if the defendant did not give any and was not hired as an attorney. The Notice of Disciplinary Charges of the State Bar, hereinafter referred to as NDC, is set forth as Exhibit H. It alleged in Count three that, "Respondent knew or reasonably should have known that the facts concerning the aforesaid investment which he was concealing from James were material to her in making the investment decision and that she needed her funds returned to her in three or four months for investment into a condominium. By concealing from James, (sic) at the time she made the aforesaid investment, (sic) the true financial state of the asset into which she was investing her funds, Respondent engaged in an act of moral turpitude as set forth in Business and Professions Code section 6106."

The Opinion states that the State Bar prosecutor "attempted to establish the charged 3-300 (business transaction with client) and section 6106 (moral turpitude) violations solely through the application of collateral estoppel without presenting any references to the record or analysis showing where and how each element of the charged violations were found by the jury in the James lawsuit by clear and convincing evidence." Exhibit G. It then stated that, "We cannot determine the factual basis upon which the jury based its findings of malice, or oppression, or fraud, and whether it was based on fraud or breach of fiduciary duty." Exhibit G.

The Opinion then changed the moral turpitude charge from concealing material facts from an investor to any act or acts, which might have formed the basis of the punitive damage award for malice, or oppression, or fraud. It then conclusively found culpability of this new charge of moral turpitude and remanded to find the facts to support the culpability finding of the new moral turpitude charge. It stated that, "... We conclude that an attorney's guilt of malice, oppression, or fraud as those terms were defined for the jury in the James' lawsuit, with respect to any attorney's breach of fiduciary duty to either a client or a non-client involves moral turpitude in violation of section 6106 as a matter of law..." Exhibit G. The Opinion states that, "We conclude that the commission of any of these acts involves moral turpitude in violation of section 6106." Exhibit G (at page 8). It states that, "However, under the circumstances and record in this proceeding, the application of those principles does not establish the nature and extent of those acts. Nor the application of those principles establish that respondent violated former rule 3-300." The remand Order then states, "Applying principles of collateral estoppel, we conclude that Bolden Bruce Kittrell is culpable of violating Business and Professions Code section 6106....we order that this matter be remanded to the hearing department for a new trial on the following issues: (1) findings of fact surrounding respondent's violation of Business and Professions Code section 6106..." Exhibit G (at 24).

The Opinion also finds that there was insufficient evidence of a business transaction with a client violation and also remands to make findings of fact and conclusions of law on the issue in a re-trial.

The Opinion admits the attorney is entitled to be exonerated of both the moral turpitude and business transaction charges as the prosecutor failed in his burden of proof.

To prevent a dismissal of the charges the Opinion finds culpability of moral turpitude by making up a brand new unnoticed charge claiming that any punitive damage award is *ipso facto* an act of moral turpitude and the prosecutor's failure to carry his burden of proof in the first trial entitles him to another trial against the accused where guilt of moral turpitude has already been made on a brand new charge just made up by the Review Department.

The State Bar of California makes thousands of dollars for itself by having its judges in its claimed "State Bar Court" find guilt of accused attorneys. The Governor closed down the State Bar of California for its improprieties for two years. The California Supreme Court has summarily denied all accuseds' petitions for ten years.

VI.

The Admission that the Prosecutor Failed in His Burden of Proof Requires Reversal and Entry of an Order of Dismissal

Attorney disciplinary proceedings are quasi-criminal in nature. When the prosecutor, after trial, fails to carry his burden of proof of the noticed charge, dismissal is required. **In re Ruffalo** (1968) 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117.

As presented to the California Supreme Court, Exhibit G, when the Opinion admits that the prosecutor failed to carry his burden of proof of culpability of the moral turpitude and business transaction charges, does not due process of law require a dismissal and not remand for a new and second trial? Are not the principles of **Arizona v. Washington** (1978) 434 U.S. 497, 503-505 wherein was stated that, "[T]he prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial," applicable to a quasi-criminal attorney disciplinary proceeding?

VII.

Is not the Finding of Culpability of a New Unnoticed Charge A Denial of Due Process of Law?

In a similar case where an attorney was charged with soliciting clients through an agent, and the agent testified that he did not solicit cases but that he investigated them, including cases against his private railroad employer, the attorney disciplinary board added a new charge after the conclusion of the trial.

The new charge alleged that the attorney conspired with his agent to prepare lawsuits against the agent's employer, "well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects [the agent] toward his employer." **In re Ruffalo** at 546-547. This Court held that, "...the charge for which the petitioner stands disbarred was not in the original charges against him. It was only after he and [the agent] testified that this additional charge was added. Thereafter, no additional evidence against petitioner was taken......"

This Court held that an attorney is entitled to procedural due process, "which includes fair notice of the charge." (citation omitted)... In the present case petitioner had no fair notice that his employment of [the agent] would be considered a disbarable offense until after both he and [the agent] had testified**."** **In re Ruffalo** at 549.

This Court's conclusion was that "The charge must be known before the proceedings commenced.... This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." **In re Ruffalo** at 552.

The Notice of Disciplinary Charges specifically alleged that the attorney committed an act of moral turpitude by concealing financial matters from the prospective investor. The Opinion finds insufficient evidence to support that charge. It then makes up a new charge and new proposition of law that any civil punitive damage award is *ipso facto* an act of moral turpitude.

Petitioner raised the issue in his motion for reconsideration that the Review Department could not change the noticed charge to a brand new one with no notice, opportunity for briefing on this new charge, or an opportunity for a hearing. Exhibit C. He then raised this issue directly with the California Supreme Court, which summarily denied review. Exhibit G.

Should not a summary order of reversal and of dismissal of both the act of moral turpitude and the business transaction charges be issued by this Court to compel compliance with the decisions of this Court that such changing of charges and refusal to dismiss when there is an admission of insufficiency of the evidence to support the charges are serious violations of due process of law?

VIII.

May Collateral Estoppel be Applied to a Civil Damage Award so as to Bar Defense of the Merits of an Attorney Disciplinary Proceeding?

This Court has stated in reference to the application of collateral estoppel to bar defense on an issue that, "The matter raised in the second suit must be identical in all respects to that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." **Tait v. Western Md. R. Co.** (1933) 289 U.S. 620.

The creation by a State of an irrebutable presumption of culpability from a state of extraneous facts so as to bar defense presents a serious issue of a taking of the property of a license from an attorney without due process and equal protection of the law.

This Court's formulations presented to the California

Supreme Court setting forth the constitutional error of finding culpability of the merits of a moral turpitude charge based on a civil damage award leave no doubt that a conclusive finding of an act of moral turpitude from a civil verdict imposing damages for fraud, or malice, or oppression is a serious due process violation. Exhibit B: (at 43).

The decisions of this Court have stated that the application of collateral estoppel requires an identical issue (**Tait**); a point actually litigated and determined (**Cromwell v. County of Sacramento** 94 U.S. 351, 352-353 quoted in **Partmar v. Paramount Corp.** (1954) 347 U.S. 89, at 91); a matter actually presented and determined (**United States v. International Building Co.**, 345 U.S. 502, 506 (1953); an issue actually litigated and determined (**Lawlor v. National Screen Service** (1955) 349 U.S. 322; a determination of fact or of mixed fact and-law essential to the decision (**Commissioner v. Sunnen** 333 U.S. 591, 601 (1948); an ultimate fact (**Commissioner** at 600); an issue necessarily resolved in the first proceeding **(One Lot Emerald Cut Stones v. United States** (1972) 409 U.S. 232; an issue actually and necessarily determined **(Montana v. United States** (1979) 440 U.S. 147; or a right, question or fact distinctly put in issue and directly determined (**Southern Pacific R. Co. v. United States** 168 U.S. 1, 48 (1897). Exhibit B (at 44).

Since an act of moral turpitude was never presented to the civil jury nor any claimed definitions of such a term and punitive damages are imposed under elasticized meanings of malice, oppression, or fraud which permits a jury to find punitive damages based on solely an act that is yucky, the application of collateral estoppel to bar defense of the merits to an accused in an attorney disciplinary proceeding based on indefinite damage findings in a civil trial offends the precepts of fairness intrinsic to the concept of due process of law.

Should not a summary reversal and dismissal issue when the Opinion claims that collateral estoppel applies to any issue in common and asserts that a punitive damage award in a civil suit is an issue in common with the merits of an act of moral turpitude charge in an attorney disciplinary proceeding? Refer Exhibit B (at 42)

IX.

Is not Act of Moral Turpitude Unconstitutionally Vague as Applied to a Civil Punitive Damage Award?

The American Bar Association deleted act of moral turpitude as a cause of attorney discipline. It stated, "[T]he Model Rules also eliminate the troublesome 'moral turpitude' standard... This standard has been broadly defined as 'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' That the standard was manifestly ambiguous is evidenced by the wide ranging interpretations given it by the courts." A.B.A. Annotated Model Rules, Rule 8.4, Misconduct, Comment, at 353. Exhibit B (at 30).

California appears to be the only jurisdiction retaining this cause for attorney discipline. There is no case holding that a civil punitive damage award is an act of moral turpitude.

The State Bar decision in this case is the first such claim. The Opinion relies on criminal conviction and theft cases to claim that a civil punitive damage award is an act of moral turpitude. Exhibit B: at 32-41. Even a conviction of a crime, which does not require a specific intent to defraud, is not an act of moral turpitude under existing California law. Exhibit B (at 41). The void for vagueness doctrine was presented at every layer to contest the application of the act of moral turpitude statute to the civil law suit. Exhibit B: (at page 30). With no core to the term, and no required intent to defraud in the civil lawsuit verdict[1], the application is unconstitutionally vague.

When there are over one hundred different meanings applied to the malice, fraud, or oppression possibilities for imposition of punitive damages, and the term "act of moral turpitude" is inherently ambiguous and vague, is not it constitutional error to assert that a punitive damage award in a civil lawsuit is *ipso facto* an act of moral turpitude? Is not the same unconstitutional for vagueness as applied? Refer Exhibit B: (at 30).

Conclusion

The attorney for thirty-four years has had no record. He has been subject to one attorney disciplinary trial where he was barred from defending himself. The appellate level found that the prosecutor failed to present sufficient evidence to support the charges. Instead, the appellate department changed the moral turpitude charge to a conclusive finding of culpability if there is a punitive civil damage award. It then remanded for a second trial to find the facts to support the guilt finding already made of the new, unnoticed charge. It once again barred the accused defending himself. Should not a summary reversal of the decision of the State Bar's Court issue with directions for the entry of an order of dismissal with prejudice of the moral turpitude and business transaction charges?

---

[1] As stated by J. Rehnquist, in dissent, in **Smith v. Wade** (1983) 461 U.S. 39, 59, "[t]he alleged deterrence achieved by punitive damages awards is likely outweighed by the costs. . . flowing from the rule, at least when the standards on which the awards are based are ill-defined."

The backwards process of barring defense, finding no evidence and refusing to dismiss, then finding guilt of a new unnoticed charge and remanding to find the facts in a second trial to support the guilt finding already made offends the concept of ordered liberty and the sanctity of life. It mocks law and the rights of those who defend and protect it.

For the foregoing, petitioner attorney respectfully requests that this Petition for a Writ of Certiorari be entertained and that a summary order of reversal issue.

Respectfully Submitted,

Dated: June 11, 2001

B. BRUCE KITTRELL
Petitioner Attorney ***Pro Se***

Verification

I have read the foregoing Petition for Writ of Certiorari to the California Supreme Court and state it is made on my own personal knowledge, information, and belief, and this verification is executed this eleventh day of June, 2001 at Torrance, California.

Respectfully Submitted

B. Bruce Kittrell
Petitioner ***Pro Se***

UNITED STATES SUPREME COURT

In the Matter of

B. Bruce Kittrell

No. 40896

A Member of the State Bar

Appendix to Petition for a Writ of Certiorari to the California Supreme Court

B. BRUCE KITTRELL
A Professional Corporation
Suite 201
Airport Office Plaza
25200 Crenshaw Blvd.
Torrance, CA 90505

(310) 891-1190

Petitioner Attorney ***Pro Se***

TABLE OF CONTENTS (APPENDIX)

A. California Supreme Court Order of March 14, 2001
B. Verified Petition for Review, California Supreme Court
C. Notice of Motion and Motion for Reconsideration of Opinion on Review
D. Review Department Order of State Bar Court of the State Bar of California in Bank
E. Opposition to Respondent's Motion for Reconsideration
F. Reply to Opposition to Motion for Reconsideration
G. Opinion on Review of the Review Department of the State Bar Court
H. Notice of Disciplinary Charges

APPENDIX, EXHIBIT A. Page 1

SUPREME COURT
FILED
March 14, 2001

Frederick K. Ohlrich
Clerk Deputy

S.B.C. No. 95-0-14521

S094082

IN THE SUPREME COURT

OF CALIFORNIA

In re BOLDEN BRUCE KITTRELL

On Discipline

Petition for writ of review DENIED.

GEORGE X
Chief Justice

B. BRUCE KITTRELL
A Professional Corporation
Suite 201
Airport Office Plaza
25200 Crenshaw Boulevard
Torrance, CA 90505

(310) 891-1190

Appellant Attorney ***Pro Se***

THE SUPREME COURT OF THE
STATE OF CALIFORNIA

In the Matter of	)	Docket No.
	)	
	)	State Bar Case No.
	)	95-0-14321
BOLDEN B. KITTRELL	)	**VERIFIED**
	)	**PETITION FOR**
	)	**INTERLOCUTORY**
	)	**REVIEW**
	)	State Bar Rules of
	)	Procedure Rule
	)	952(c)
	)	
No. 40896	)	
A Member of the State Bar	)	
	)	

I.

Introduction

This is a petition for interlocutory review pursuant to California Rules of Court Rule 952(c) to review a published opinion of the Review Department of the State Bar Court of the State Bar of California. Said opinion was authored by a non-lawyer. Exhibit A.

The grounds for review are 1) the opinion admits that the prosecutor failed to present sufficient evidence of professional misconduct of an act of moral turpitude or business transaction violation requiring that this Court issue an order exonerating the accused of those charges; 2) The conclusion of law that a punitive damage award in a civil suit is *ipso facto* an act of moral turpitude is unconstitutional; 3) The application of collateral estoppel to a civil suit's damage issue so as to bar trial on the merits of a quasi-criminal attorney disciplinary proceeding is unconstitutional; 4) The change in the moral turpitude charge by the Review Department requires an order issue exonerating the accused of that charge; 5) An opinion authored by a non-lawyer in an attorney disciplinary matter offends the due process requirement that there be a tribunal with a degree of knowledge of the law; 6) the publication of an opinion by the State Bar is unconstitutional requiring that the publication be ordered withdrawn and that the State Bar be ordered to cease and desist from issuing its advisory opinions as claimed Court of law decisions.

In the event that this Honorable Court is unable to consider these questions, Appellant respectfully requests that the above six questions be certified for the United States Supreme Court.

This case is the classic example of Alice saying, "What is the charge?" to which the Queen responds, "First the verdict, then the trial, and then the new charge." See Carroll, Lewis, Alice in Wonderland and Through the Looking Glass, Harcourt, Brace, Chapters 11-12. The Review Department issued the verdict first finding guilt of an unnoticed charge while admitting there was no evidence to support the noticed charges, then it remands to find the facts to support its guilt finding already made, and it does so by purporting to change the charges from those noticed to anything that can be now be made up. First the verdict, and then the trial, and never a specific or known charge.

Rule 954(a) sets forth the circumstances in which this Court will grant review: "The Supreme Court will order review of a decision of the State Bar Court recommending disbarment or suspension from practice when it appears (1) necessary to settle important questions of law; (2) the State Bar Court has acted without or in excess of jurisdiction; (3) petitioner did not receive a fair hearing; (4) the decision is not supported by the weight of the evidence; or (5) the recommended discipline is not appropriate in light of the record as a whole." Rule 954(b) specifies the consequences of an order denying a petition for review: "Denial of review of a decision of the State Bar Court shall constitute a final judicial determination on the merits and the recommendation of the State Bar Court shall be filed as an order of the Supreme Court."

This Petition should be entertained as 1) it is important to settle the important questions of law concerning fatal variance, collateral estoppel, exoneration of an accused, competence of a non-lawyer to write legal opinions concerning the professional conduct of attorneys, and publication of opinions by the State Bar; 2) the State Bar's Court has acted without and in excess of its jurisdiction in changing the moral turpitude charge, failing to issue an exoneration of the accused, finding a conclusion of law that is not approved by this Court nor based on its precedent and which is unconstitutional, denying to the accused the right to a trial before finding culpability of a charge, applying collateral estoppel to bar the right of the accused to a trial, and in publishing its opinion as a Court of law decision; 3) there was admittedly no evidence to support the noticed moral turpitude and business transaction charges; and 4) petitioner received no fair hearing at any stage of the proceeding. California Rules of Court, Rule 954(a).

"Rule" refers to a California Rule of Professional Conduct. "Section" refers to a section of the State Bar Act contained in California Business and Professions Code. References hereinafter to "Opinion" or "Opn" refers to the Opinion on Review issued by the Review Department of the State Bar's Court. Citations to this Opinion are made by reference to the page, the paragraph, and then the line from the top of the page on which the material appears.

The opinion of the Review Department is attached hereto as Exhibit A. The hearing department opinion is attached as Exhibit B. The Notice of Disciplinary Charges is Exhibit C. The Motion to Withdraw Publication of Opinion is Exhibit D. The [Petitioner's] Motion to Reconsider the Opinion on Review is Exhibit E. The OCTC [Office of the Chief Trial Counsel of the State Bar of California] Request for Reconsideration is Exhibit F. The Opposition to the OCTC [Office of the Chief Trial Counsel of the State Bar of California] Request for Reconsideration is Exhibit G. The [OCTC's] Opposition to the [Petitioner's] Motion to Reconsider the Opinion on Review is Exhibit H. The Reply to the OCTC's Opposition to the [Petitioner's] Motion to Reconsider the Opinion on Review is Exhibit I. The Response to Respondent's Motion for Withdrawal of Publication of Opinion is Exhibit J. The Reply to Response to Respondent's Motion for Withdrawal of Publication Opinion is Exhibit K. The Review Department order denying the respective motions for reconsideration and to withdraw publication is Exhibit L.

A. Facts

The respondent attorney has been an attorney for thirty-four years. He has had no prior disciplinary record. The civil judgment concerning a failed investment of a non-client is his first disciplinary proceeding in his thirty-four year career as an attorney at law. Refer to the Exhibits which were presented below and which are Exhibit 2 and N: 157:17-26, 158:1-2, 12-16, 168:9-11, 201:15-26, 211:14-26, 212:1-5, 213: 13-26, 214:1-16, 24-25. The attorney's performance as an attorney at law is impeccable as is his reputation as an attorney at law for thirty-four years. He is acknowledged as a real estate expert and as a real estate broker. The civil lawsuit merits were tried on a preponderance of the evidence. The punitive damage instruction was based on clear and convincing evidence. The punitive damage instruction permitted a finding based on malice, or fraud, or oppression without specification as to what was the ground relied on by the jury in imposing such damages. Exhibit A:5: para.3: 22-26. The Review Department Opinion omitted the material fact that on the fraud cause of action, the jury split nine to three with three jurors finding no fraud and under the preponderance of the evidence standard of proof. Refer Exhibit L- 1 to Appellant's Opening Brief to the Review Department. It also omitted that the jury instruction on fraud permitted a finding based on a reckless statement having been made based on a preponderance of the evidence. Refer Exhibit I to Appellant's Opening Brief to the Review Department. It also omitted the material fact that the legal malpractice jury instruction permitted a finding if a person solely sought legal advice even if the attorney did not contract to be an attorney for the person, accepted no payment, did not desire to be the attorney for the person, and refused to provide any legal advice or render any legal services for the person. Refer Exhibit 604 (001807) to the July 28, 1997 filed, endorsed "Submission of Jury Instructions Given in James v. Kittrell, **O.C.S.C.** Case No. 78730 filed with the Hearing Department by the Office of Trials.

The Review Department of the State Bar's Court issued its advisory opinion on October 26, 2000. Exhibit A. The Opinion admits that the accused attorney was denied a right to present evidence, to confront his accusers, to cross-examine witnesses, and to produce witnesses and testimony in his own defense at the State Bar hearing by the misapplication of principles of collateral estoppel by the hearing judge. Exhibit A: 4: para. 1, 3-12, 8: para.3, 16-25, 9: para.2, 3, and 4: 6-22, 10: para. 1 and 2, 1-13. The Opinion admits that the hearing judge erred in barring such due process rights of the accused. Exhibit A: 4: para. 1, 3-12, 8: para.3, 16-25, 9: para.2, 3, and 4: 6-22, 10: para. 1 and 2, 1-13. It admits that the hearing judge improperly applied collateral estoppel to claimed facts which were not sufficiently proven by the prosecutor concerning an act of moral turpitude and a business transaction violation. Exhibit A: 4: para. 2, 13-23, 7: para. 3, 15-22, 8: 1-2. It then establishes a *per se* rule that any punitive damage award in a civil law suit is *ipso facto* an act of moral turpitude. Exhibit A: 3: para. 3, 23-26. This completely changed the moral turpitude charge from that which was noticed[1] to a brand new charge made up *sua sponte* by the Review Department after the trial. In relying on such a law conclusion admittedly devoid of notice, facts or precedent, it compounds the denial of a right to a fair procedure consonant with due process of law in that it 1) changes the moral turpitude charge from that set forth in the Notice upon which the proceeding was had, 2) adds a new charge without notice, pleading, trial, right to prepare and defend on the new charge claimed to have been violated for the first time in the Opinion; 3) finds guilt of the new unnoticed charge without a trial or notice, 4) admits a judgment of the exoneration of the attorney is required on the moral turpitude and business transaction charges in that it admits there is insufficient evidence to sustain either finding and refuses to issue the dismissal of those charges, 5) asserts that remand and retrial is permitted to allow the prosecutor a second trial when he failed in carrying his burden of proof on the noticed charges at the first trial, and 6) claims remand is necessary as the conclusion of law has already been made of culpability on the new unnoticed moral turpitude charge and a second trial is needed to try and obtain the facts to support the verdict already made. Exhibit A.

---

[1] The noticed moral turpitude charge was that, "Respondent reasonably knew or should have known that the facts concerning the aforesaid investment which he was concealing from James were material to her in making the investment decision and that she needed the funds returned to her in three or four months for investment into a condominium. By concealing from James, at the time she made the aforesaid investment, the true financial state of the asset into which she was investing her funds, Respondent engaged in an act of moral turpitude as set forth in Business and Professions Code section 6106." Exhibit C: 7: 23-27, 8:1-5. This is the only moral turpitude charge.

First the verdict, and then the trial, and never a known charge as the charge changes at will and after trial. Alice in Wonderland and Through the Looking Glass and the Mad Hatter are no more bizarre than the conduct of this case by the State Bar Court of the State Bar of California. The fact that the Review Department opinion was authored by a non-lawyer has surprised no lawyer or judge who has read the Review Department opinion.

This advisory opinion states that it issues from a State Bar Court when the proceeding was maintained in the State Bar Court of the State Bar of California. It has stamped on it "Public Matter-Designated for Publication." Before the Motion to Withdraw Publication could be filed within the time designated, the State Bar published this opinion in the Daily Appellate Reports as a court decision of the State Bar Court and disseminated it state-wide to lawyers and judges in The Los Angeles Daily Journal. Exhibit M.

The advisory Opinion opines that an act of moral turpitude occurred as a matter of law. It changed the noticed moral turpitude charge and created a new charge and a conclusive finding of guilt of the new unnoticed and untried charge that a punitive damage award in a civil lawsuit is *ipso facto* an act of moral turpitude. Refer footnote 2. The Opinion states that, "In light of the foregoing well-established law regarding moral turpitude, we conclude that an attorney's guilt of malice, oppression, or fraud as those terms were defined for the jury in the James' lawsuit, with respect to the attorney's breach of a fiduciary duty to either a client or a non-client involves moral turpitude in violation of section 6106 as a matter of law." Exhibit A: 17, para. 2, 15-26. It states that, " We conclude that the commission of any or all of these acts involves moral turpitude in violation of section 6106." Exhibit A: 16, lines 13-15. This would make a substantial change in the law. The Opinion admits it lacks authority for such a claim. It also admits it can not find any facts in support of such a charge. The Opinion issued without notice of the new charge, the change in the noticed charge, and without opportunity for a trial, the right to a hearing or a right to be heard on the new charge. The Opinion remands the matter to make findings concerning the nature and extent of the moral turpitude finding which is made as a matter of law. It admits it is a bare conclusion unsupported by facts. Due process does not permit conclusions without supporting facts. It does not permit changing the charge after the trial is over so as to avoid issuing a finding of innocence of the accused. The Opinion admits there is insufficient evidence to support the moral turpitude and business transaction charges, yet it did not issue an order exonerating the attorney as is required under the due process and equal protection clauses of the United States Constitution.

Due to the unconstitutionality and excesses of jurisdiction of the State Bar and its Court in denying the accused a trial in the Hearing Department with rights to confront witnesses, cross-examine witnesses, defend, present testimony, witnesses, and evidence, and a fair and impartial adjudicator, and then the Review Department compounding the unconstitutionality of the process by finding guilt of a charge not made while admitting it had no facts to support the culpability finding, and admitting that the prosecutor failed to prove his case, then remanding for a new trial to find the facts to support the finding of guilt already made, and then publishing this state-wide so as to prejudice the rights of the accused to a fair trial and a fair procedure, this Petition should be entertained to rein in the excesses of the State Bar Court of The State Bar of California.

II.

The Admission that the Prosecutor Failed to Carry His Burden of Proof Requires an Order Exonerating the Attorney

The Review Department Opinion admits the prosecutor failed to present sufficient evidence to establish by clear and convincing evidence culpability of the act of moral turpitude and business transaction charges. This requires an order issue dismissing these charges for insufficiency of the evidence and exonerating the accused.

A. The Admission that the Prosecutor Failed to Prove the Moral Turpitude Charge Requires an Order Dismissing The Charge with Prejudice and Exonerating the Attorney

When a prosecutor conducts a trial and has failed to prove his case, a judgment of acquittal is required. See **In re Ruffalo** (1968) 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117, **In re Primus** 436 U. S. 412. When the State Bar prosecutor fails to present clear and convincing evidence of culpability of the charge, dismissal with prejudice of the charge is required due to insufficiency of the evidence presented. State Bar Rules of Procedure Rule 219. The prosecutor conducted a trial in which the accused was excluded. The Opinion held that even barring the accused presenting any evidence or participating in the trial did not result in the prosecutor being able to prove his case. It states that it is impossible to ascertain what facts support the moral turpitude and business transaction charges. Exhibit A: 4: para. 2, 13-23, 7: para. 3, 15-22, 8: 1-2.

The Review Department before the trial had issued an order stating that "collateral estoppel applies only to those issues that the jury in the James lawsuit found by clear and convincing evidence." Exhibit A: 6: para. 3, 5, 7:1-2. Then the hearing judge issued a clarifying order in which "the hearing judge correctly pointed out to the parties that the application of principles of collateral estoppel with respect to prior civil findings does not modify the fundamental requirement that, to establish a disciplinary violation, OCTC must prove each element of a charged violation by clear and convincing evidence. As the hearing judge noted, if an element of a charged violation was not previously found by the jury by clear and convincing evidence, OCTC would be required to establish that element in this proceeding with clear and convincing evidence independent of the principles of collateral estoppel." Exhibit A:7; para. 1:4-8, 11-14. The Opinion then states that, "Notwithstanding the admonitions in our order denying respondent's petition for interlocutory review and the hearing judge's clarification order regarding the proper application of collateral estoppel in this proceeding, OCTC attempted to establish the charged former rule 3-300 [business transaction rule] and section 6106 [moral turpitude] violations solely through the application of principles of collateral estoppel without presenting any references to the record or analysis showing where and how each element of the charged violations were found by the jury in the James lawsuit by clear and convincing evidence." (Ft. omitted). Instead, OCTC left it to the hearing judge to glean through the voluminous documents that it introduced into evidence and determine whether each element of the charged violations were found by the jury by clear and convincing evidence." Exhibit A: 7 :para. 2:15-22, 8:1-2.

What is clear is that a record based on the merits being tried on the preponderance of the evidence burden of proof with a jury split of nine to three on the civil fraud cause of action could never yield clear and convincing proof of anything. The prosecutor chose his method of presenting his evidence. He failed to do so. He presented no clear and convincing evidence. This requires that the moral turpitude and business transaction charges be dismissed with prejudice with an order issue exonerating the accused of those charges. Prosecutors do not get to retry their quasi-criminal cases when they fail in their first trial to carry their required burden of proof. The Review Department, however, concluded that the actual moral turpitude charge that was noticed of concealing facts from the investor and doing business with a client alleged violations were not proven. It stated that, "We... must reverse the hearing judge's factual findings regarding the 6106 [moral turpitude] violation." Exhibit A:18: para. 3:20-21. Instead of issuing an order dismissing that charge, the Review Department changed the moral turpitude charge *sua sponte* from the one that was noticed in the Notice of Disciplinary Charges to a brand new one never noticed of a punitive damage award in the civil lawsuit. Refer footnote 2 and Exhibit A: 17: para.2: 15-18. The issue of the required exoneration of the attorney as a matter of law is a product of the due process of law, equal protection of the law, and double jeopardy principles of constitutional adjudication and the lack of authority within the State Bar to do no less. While the accused was barred from participating in the trial, no such restraint operated on the prosecutor. The collateral estoppel ruling of the hearing judge made clear that it did not operate to establish culpability or any facts by the required clear and convincing burden of proof and that the prosecutor retained his required burden of proof of presenting clear and convincing evidence of each element required to prove a violation under the noticed charges. The prosecutor chose to present no evidence, other than the civil lawsuit's record, bearing on the issues. He failed to carry his burden of proof of presenting clear and convincing evidence of any facts supporting culpability of an act of moral turpitude or a business transaction violation. Fundamental fairness dictates a prosecutor who fails in his mission is not given a second opportunity to try and undo his failure by harassing the accused with a second prosecution. ".... [T]he prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." **Arizona v. Washington,** (1978) 434 U.S. 497, 503-505 (footnotes omitted).

The due process clause also does not permit the Court to change the charge from that which was noticed to make up after the trial a brand new one. **In re Ruffalo.** The charge was concealing facts from a woman investor which the attorney should have known were material facts to her and that she needed her funds in a short period of time. Exhibit C: Count three, Notice of Disciplinary Charges 7:23-27, 8:1-5. The opinion states automatic guilt is found of an act of moral turpitude based on any act of malice, oppression, or fraud in any capacity. Exhibit A:3: para. 3, 23-26. It then admits it can find no facts to support this conclusion of law and remands to find such facts. Exhibit A: 4: para. 2, 13-23, 7: para. 3, 15-22, 8: 1-2, 14: para. 1, 6-10. The State Bar's Court has no constitutional nor statutory authority to refuse to enter the required exoneration of the attorney on the charges that were, in fact, made and which the Opinion admits there is insufficient evidence to sustain. Exhibit A:4: para. 2, 13-23, 7: para. 3, 15-22, 8: 1-2, 14: para. 1, 6-10. The State Bar Act limits the power of the State Bar Court to dismissal of the proceeding, or entering a private or public reproval, or recommending to the California Supreme Court the suspension or disbarment from the practice of law of an attorney. California Business and Professions Code sections 6077, 6078 and State Bar Rules of Procedure Rule 219. There is no constitutional or statutory authority nor any Rule of Court which empowers the Review Department of the State Bar's Court to do other than the five options provided. The Opinion must be withdrawn and an order issued dismissing the moral turpitude charge for insufficiency of the evidence and entering an order exonerating the accused as is required under due process of law and the statutes upon which the authority of the State Bar depends.

B. The Admission that the Prosecutor Failed to Prove the Business Transaction Charges Requires an Order Exonerating the Attorney.

The Review Department Opinion states that there was not clear and convincing evidence to support a claim that the investor was a client and that any duties owed to a client concerning entering into a business transaction were violated. Exhibit A: 19, para. three, 14-16, 20, 1-2, para. 1:3-10. It admits that the issue was not adjudicated in the civil lawsuit and that the prosecutor presented no evidence on the issue. The Opinion states that, "...[N]one of the elements of a former rule 3-300 (business transaction) violation are expressly addressed in the definitions given to the jury with respect to special finding 10 [the punitive damage instruction].... [T]he application of collateral estoppel does not establish that respondent violated former rule 3-300." Exhibit A:19: para. three; 25-26, 20: 1-2.

Since the opinion on review also admits it can find no facts in support of the business transaction charge, and it reverses and remands for a new trial to find the facts to support the conclusion it makes of guilt of the charge it made up for the first time of an act of moral turpitude and to find facts concerning the business transaction violation, the attorney is entitled to an order exonerating him of both charges. Those admissions compel a finding that the attorney is exonerated of the charge of violating the former 3-300 (business transaction) rule. ...The Opinion states that, "[W]e cannot exercise our authority to independently review and reweigh the evidence in the James lawsuit under the clear and convincing standard of proof and make our findings with respect to the charged rule 3-300 violations. ... [We] reverse... and remand the matter for a new trial on the issue of respondent's culpability of former rule 3-300 violations." Exhibit A: 20: para. 1, 7-13. It is a denial of due process to refuse to enter the required exoneration of an attorney and to provide a prosecutor a second bite at the apple when the prosecutor knowingly failed to present sufficient evidence on the charge to sustain it. As the Review Department Opinion admits, its' prior order to the hearing judge "specifically pointed out that collateral estoppel applies only to those issues that the jury in the James lawsuit found by clear and convincing evidence." Exhibit A: 6: para. 3, 26, 7: 1-2. It was the prosecutor who knew that no issue of the existence of a client or of any business transaction rule was adjudicated, mentioned, or tried in the civil proceeding. It was the prosecutor's duty to present clear and convincing evidence. He failed to do so. The attorney is entitled to be exonerated as a matter of law. When "[t]he charges of unprofessional conduct are not sustained by convincing proof to a reasonable certainty," the attorney is entitled to a judgment of exoneration of the charges. **McCray v. State Bar** (1985) 38 Cal.3d 257, 263; 211 Cal. Rptr. 691, 696 P.2d 83, **Aronin v. State Bar** 52 Cal. 3d 276, at 282; 801 P.2d 403, 276 Cal. Rptr. 160. **Kapelus v. State Bar** 44 Cal.3d 179, 184.

C. The Principles of Double Jeopardy Apply to this Quasi-Criminal Proceeding and Prohibit a Remand for a New Trial

While this Court has held that the double jeopardy clause does not apply to State Bar proceedings, **Crooks v. State** (1989) 275 Cal. Rptr. 420, at 427, the United States Supreme Court has not dealt with this issue. As held by the United States Supreme Court in **In re Ruffalo**, attorney disciplinary proceedings are quasi-criminal proceedings in which many criminal law protections apply. The United States Supreme Court has dealt with the application of the double jeopardy clause to another quasi-criminal proceeding, to wit, juvenile court dependency court proceedings. In **Swisher v. Brady** (1978) 438 U.S. 204, the United States Supreme Court applied the double jeopardy clause to juvenile court dependency proceedings. It stated that, "The general principles governing this case are well established. 'A State may not put a defendant in jeopardy twice for the same offense. **Benton v. Maryland**, 395 U.S. 784. The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though `the acquittal was based upon an egregiously erroneous foundation.' . . .(At 214) Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's `valued right to have his trial completed by a particular tribunal.' . . . Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." **Arizona v. Washington,** (1978) 434 U.S. 497, 503-505 (footnotes omitted).

The United States Supreme Court has held that a civil monetary penalty sufficiently disproportionate to the harm caused to the government was "punishment" for double jeopardy purposes. **United States v. Halper** (1989) 490 U.S. 435. The Supreme Court held in **Halper** that a civil penalty is "punishment" if it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving a retributive or deterrent purposes." 490 U.S. at 448. A sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. **United States v. $405,089.23 U.S. Currency** (9th Cir. 1994) 33 F 3d 1210, 1219. While the stated purpose of attorney disciplinary purposes is not to punish the attorney, but is remedial, in this case, it is punishment that is at issue rendering the proceedings a probable violation of the double jeopardy clause.

The Review Department Opinion asserts that punishment damages in a civil suit are *ipso facto* professional misconduct in an attorney disciplinary proceeding. As stated by the United States Supreme Court in **Washington Gaslight Co v. Lansden** (1899) 172 U.S.

534, "Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff."

The Review Department asserts this is conclusively an act of moral turpitude although no facts can be found to support such a conclusion of law. When the punitive damages in a civil suit are used to find culpability, and such money damages have as their sole purpose the dual purpose of punishment and deterrence, the remedial purpose of this proceeding is absent. It is punishment pure and simple. It thus falls within the double jeopardy principles prohibiting remand for a new trial and requires an order exonerating the accused of the moral turpitude and business transaction charges.

A central purpose "of the prohibition against successive trials" is to bar "the prosecution [from] another opportunity to supply evidence which it failed to muster in the first proceeding." **Burks v. United States**, (1978) 437 U.S. 1, 11. The Double Jeopardy Clause also precludes the prosecutor from "enhanc[ing] the risk that an innocent defendant may be convicted." **Arizona**, at 504. It prohibits unfairly subjecting the defendant to the embarrassment, expense, and ordeal of a second trial. **Green v. United States** (1957) 355 U.S. 184. See also **Breed v. Jones**, (1975) 421 U.S. 519. As stated in **United States v. Jenkins** (1975) 420 U.S. 358 at 370, "[I]t is enough for purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings . . . . [To do so] would violate the Double Jeopardy Clause."

D. Fundamental Due Process of Law Prohibits Successive Prosecutions for the Same Alleged Offense

In operation, due process requires notice of the cause or causes in sufficient detail and sufficient time to fairly enable a party to show any error that may exist, the right to be advised of the names and the nature of the violation alleged, the right to a meaningful opportunity to be heard in his own defense, and a hearing before a tribunal that both possesses some academic expertise and has an apparent impartiality towards the claims. **Pickering v. Board of Education** (1968) 391 U.S. 563, 578 n.2; 88 S. Ct. 1731, 1739 n.2; 20 L. Ed.2d. 811. See also **Goss v. Lopez** (1975) 419 U.S. 565; 95 S. Ct. 729; 42 L. Ed. 2d. 725. The Petitioner challenges a lay-person authoring or participating in the Opinion which asserts that, as a matter of law, an award of punitive damages is *per se* an act of moral turpitude. The Opinion's author, J. Norian, is a non-lawyer. A non-lawyer issuing an Opinion on a pure legal issue appears to be a denial of the fundamental right of the attorney that he be judged by a tribunal which possesses academic expertise in the legal issues adjudicated.

"The states have the power to control the practice of law in their courts. However, that power may not be exercised so as to ignore federally protected rights." **NAACP v. Button** (1963) 371 U.S. 415, 439; 83 S. Ct. 328; 9 L.Ed. 2d. 405. "Procedural due process, including fair notice of any charges against him, is a federally protected right of an attorney." **In re Ruffalo** (1968) 390 U.S. 544, 550-551; 88 S. Ct. 1222; 20 L.Ed. 2d. 117. As held by the Court in **In re Ruffalo, supra**, at 551, "The charge must be known before the proceedings commence." Successive or duplicative prosecutions, separate and apart from double jeopardy considerations, offend the basic precepts of due process of law and are unconstitutional. **Blockburger v. United States** (1932) 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306, 309 and **United States v. Dixon** (1993) 509 U.S. 688; 113 S. Ct. 2849; 125 L. Ed. 2d 556. Such is this case with the Review Department's remand order for another and second trial.

III.

The Change in the Moral Turpitude Charge by the Review Department Requires The Attorney Be Exonerated

A fatal variance exists between the Notice of Disciplinary Charges, hereinafter referred to as NDC or "The Notice," upon which this proceeding was based and the Review Department Opinion concerning the act of moral turpitude charge.

The act of moral turpitude charge was set forth in count three in the Notice of Disciplinary Charges. It is set forth in full at footnote 2. This is the only moral turpitude charge.

While it appears that the noticed charge states no cause of action of moral turpitude which is legally cognizable,[2] the Review Department Opinion admits there are no facts to support the noticed charge. It states that, "We cannot determine the factual basis upon which the jury based its finding of malice, or oppression, or fraud, and whether it was based on fraud or breach of fiduciary duty. "Nor can we determine the nature and extent of those acts by independently reviewing the record." Exhibit A:18: para 1, 6-13.

---

[2] The attorney filed a motion to dismiss the moral turpitude charge on March 24, 1998 setting forth how the facts claimed of "reasonably knew or should have known that the facts concerning the aforesaid investment which he was concealing from James were material to her in making the investment decision and that she needed

The Opinion states at Exhibit A:15, para. 1, 6-12 that, "Our independent review establishes that the only common issues that were found against respondent by the jury under the clear and convincing standard of proof and that are necessary to support the judgment in that lawsuit are those issues that the jury found when it unanimously answered "yes" to special finding 10." Special finding No. 10 was the damage instruction concerning punitive damages and not a merit instruction. It requested the jury to consider that "[If] you find that [the investor suffered actual injury, harm or damage caused by [the attorney's] breach of fiduciary duty or fraud, you must decide in addition whether by clear and convincing evidence you find that there was oppression, malice, or fraud in the conduct on which you base your finding of liability." Exhibit A: 15, footnote 7.

---

the funds returned to her in three or four months for investment into a condominium," stated no cause of action of an act of moral turpitude. Divining the state of mind of an investor is not part of the duties of a person offering an investment and not disclosing facts, when all of the financial records and transactions are made available to an investor to take to an accountant or a lawyer, is not a duty that is by law imposed on one offering an investment. With no case law to support such claims indicating that such is an act of moral turpitude, no cause of action was stated.

The Opinion states that, "In light of the foregoing well-established law regarding moral turpitude, we conclude that an attorney's guilt of malice, oppression, or fraud as those terms were defined for the jury in the James' lawsuit, with respect to the attorney's breach of a fiduciary duty to either a client or a non-client involves moral turpitude in violation of section 6106 as a matter of law." Exhibit A: 17, para. 2, 15-26. It then states that, " We conclude that the commission of any or all of these acts involves moral turpitude in violation of section 6106." Exhibit A:.16, lines 13-15.

The Opinion admits that there is not sufficient evidence in the record to establish by clear and convincing evidence that the charged facts of knowing the investor's needs and concealing facts from her occurred. Since those are the facts of which the attorney had notice in the Notice of Disciplinary Charges as the charged moral turpitude violation, he is entitled to an order exonerating him of the moral turpitude charge.

The exoneration of the attorney of the act of moral turpitude charge is required by the decisions of the United States Supreme Court in **In Re Ruffalo** (1968) 390 U.S. 544, 550; 88 S. Ct. 1222, 1225; 20 L. Ed. 117 and **Saunders v. Shaw** (1917) 244 U.S. 317.

In **Saunders** a State Supreme Court reversed a case and rendered judgment absolute against the party who succeeded in the trial court upon a proposition of fact which was ruled to be immaterial at the trial and concerning which the party had no proper opportunity to introduce his evidence. This rendering of a decision on an issue not properly pled, raised, or tried compelled reversal of the Supreme Court decision. Likewise, the Review Department Opinion's conclusion that the attorney committed an act of moral turpitude based on facts never alleged and not found when admittedly the facts pled in support of the act of moral turpitude noticed charge were not supported by evidence requires an order exonerating the attorney of the moral turpitude charge.

In **Ruffalo** the United States Supreme Court summarily reversed the disbarment decision with no remand for further proceedings. The effect was to exonerate the attorney of the charges. It is fundamental that when a prosecutor cannot prove his case, a court of law may not make up a new charge in the appellate process. The due process violation of changing the charge after the trial is over compels automatic reversal of the opinion and the entry of an order exonerating the accused of the moral turpitude charge.

In **Ruffalo** the charges concerned alleged soliciting of clients through an agent. The agent testified that he did not solicit cases. He investigated them at the request of the attorney, including cases against his private railroad employer. As a result of the agent's testimony, the Board added a new charge in the middle of the trial. The new charge alleged that the attorney did conspire with his agent to prepare lawsuits against the agent's employer, "well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects [the agent] toward his employer." **Ruffalo** at 546-547. The United States Supreme Court in **Ruffalo** stated the following in reversing the disbarment decision and refusing to remand for further proceedings, at 549:

> "... the charge ... for which petitioner stands disbarred was not in the original charges made against him. It was only after he and [[the agent] testified that this additional charge was added. Thereafter, no additional

evidence against petitioner relating to [the] charge was taken. ...

(At 550) Disbarment, designed to protect the public, is a punishment or penalty imposed on a lawyer. **Ex Parte Garland** 4 Wall. 333, 380, **Spevack v. Klein** 385 U.S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See **In re Oliver** 333 U.S. 257, 273.....

In the present case petitioner had no notice that his employment of [the agent] would be considered a disbarable offense until after both he and [the agent] had testified (at 551) at length on all the material facts pertaining to this phase of this case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' (Citation omitted).

These are adversary proceedings of a quasi-criminal nature. Cf. **In re Gault**, 387 U.S. 1, 33. **The charge must be known before the proceedings commence.** (Emphasis added). They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh....

(At 552)

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process. Reversed."

The charge was that the attorney knew the investor's state of mind and concealed information that was material to her. The opinion admits there is not clear and convincing evidence of any of those facts. Instead, it purports *ex parte* and *sua sponte*, and for the first time by way of a written Opinion finding culpability, to change the noticed charge of an act of moral turpitude to being any punitive damage award in a civil law suit. This changes the charge of an act of moral turpitude from being reasonably knowing a person's state of mind and concealing information so as to be any number of over one hundred or so different fact possibilities that were never noticed before the trial and never presented, tried, heard, decided, or permitted to be defended against. To find petitioner culpable based on uncharged misconduct is a denial of due process. (**Rose v. State Bar** (1989) 49 Cal.3d 646, 654 [262 Cal. Rptr. 702, 779 P.2d 761].)

IV.

The Conclusion of Law that a Punitive Damage Award is *Ipso Facto* an Act of Moral Turpitude is Unconstitutional

Because the Review Department ambushed the accused attorney by making up a new moral turpitude charge in its Opinion for the first time, then found automatic guilt of its new charge while admitting it had no facts to support such a finding, the accused attorney was never permitted an opportunity to be heard that the claimed new charge contending that a punitive damage award in a civil suit is *ipso facto* an act of moral turpitude is unconstitutional and that his due process rights do not permit the Review Department to ignore the requirement of exonerating the accused on the charges actually made and prohibit it from making up a new charge after the hearing is finished. Refer **In re Ruffalo** (1968) 390 U.S. 544; 88 S.Ct. 1222; 20 L. Ed. 117. These matters were presented in the Motion for

Reconsideration, the opposition to the OCTC's Request for Reconsideration, the Reply to the OCTC's Opposition to the Motion for Reconsideration, the Reply to Response to Respondent's Motion for Withdrawal of Publication of Opinion which are attached as Exhibits E ,G, I, and K.

A. Punitive Damages Require No Specific Intent

The United States Supreme Court has stated that punitive damages are not necessarily about an intentional act. The assertion that criminal convictions involving acts of moral turpitude are the basis for the reasoning that a punitive damage award in a civil law suit is automatically an act of moral turpitude fails as the former require specific intent and the latter require no intent. An intent to defraud is an essential element of an act of moral turpitude when one is not dealing with a heinous crime as set forth in the United States Supreme Court's decision in **Jordan v. DeGeorge** (1951) 341 U.S. 223; 71 S. Ct. 703; 95 L. Ed 886.

In **Smith v. Wade** (1983) 461 U.S. 30, the United States Supreme Court was confronted with a civil jury verdict against a corrections officer and others for recklessly violating the civil rights of an inmate. The jury awarded compensatory and punitive damages.. The jury was instructed that it could award punitive damages in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others to not engage in such conduct. The jury was instructed that if it found the issues in favor of the plaintiff, and if the conduct of one or more of the defendants was shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others, then they may assess punitive or exemplary damages in addition to an award of actual damages. The defendants contended that this was not a proper case to award punitive damages because 1) punitive damages could be awarded on a finding of reckless or callous disregard or of indifference to the inmate's rights to safety, 2) the correct standard for imposing punitive damages is one of actual malicious intent-"ill will, spite, or intent to injure," and 3) punitive damages can not be awarded when the liability issue is one of recklessness and so is the punitive damage award. The Court reviewed the entire history of punitive damages and said the following, **Smith**, at 38:

> "[The defendants] do not argue that the common law, either in 1871 or now, required or requires a showing of actual malicious intent for recovery of punitive damages.... (At 39) [T]here was significant variation (both terminological and substantive) among American jurisdictions in the latter 19th century on the precise standard to be applied in awarding punitive damages-variation that was exacerbated by the ambiguity and the slipperiness of such common terms as 'malice' and 'gross negligence.' Most of the confusion, however, seems to have been over the degree of negligence, recklessness, carelessness, or culpable indifference that should be required-not over whether actual intent was essential. On the contrary, the rule in a large majority of jurisdictions was that punitive damages (also called exemplary damages, vindictive damages, or smart money) could be awarded without a showing of actual will, spite, or intent to injure........... (at p.44) The large majority of state and lower federal courts were in agreement that punitive damages awards did not require a showing of actual malicious intent;

> they permitted punitive damages on variously stated standards of negligence, recklessness, or other culpable conduct short of actual malicious intent. The same rule applies today. The Restatement (Second) of Torts (1979), for example, states 'Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others..... Most cases under state common law, although varying in their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence.

Footnote 8 in **Smith,** at 38, states that an actual state of mind for the imposition of punitive damages is not necessary and that such damages are imposed under a wide variety of elastic meanings filled with vagueness and indefiniteness. It states at 38, "'Malice,' as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings. See generally, e.g., 2 J. Sutherland, Law of Damages 394 (3d ed. J. Berryman, 1903); 25 Cyclopedia of Law and Procedure 1666-1669 (1907).....{in some instances (especially when it was modified by terms such as 'actual' or 'express', or in criminal law, where terms were generally more strictly construed than in civil law), it mean[sic] what the dissent says it meant-actual ill will, spite, or intent to injure. On the other extreme, in tort law, it was often used without modification to mean what was sometimes called 'implied malice'- a purely fictional malice that was conclusively presumed to exist whenever a tort resulted from a voluntary act, even if no harm was intended. The term was sometimes, though not often, used in this fictional sense as a ground for punitive damages. E.g. **Childers v. San Jose Mercury Printing & Publishing Co.**, 105 Cal. 284, 289; 38 P. 903, 904-905."

Malice can not be *ipso facto* an act of moral turpitude as it requires no specific intent. Malice has over many possible meanings. The definition given to the jury in regard to the punitive damage claim was the following: "Malice" means "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others.". Exhibit A:15:ft.7. However, the definitions given for each term carries with them infinite possibilities of expanded meanings applicable to any number of fact patterns never contemplated by the term "moral turpitude." "Despicable" as set forth in the Microsoft Word for Windows 98 Thesaurus has synonyms of "abject" with a number of possible definitions including the following: "the most contemptible kind or basely cowardly;" or "base"; or "low"; or "low-down"; or "miserable"; or "pathetic"; or "pitiable"; or "pitiful"; or "vile." "Willful" has synonyms of "by choice," or "free," or free will, and means "done by design," or "by conscious design or purpose." "Disregard" has no synonyms and means "refuse to acknowledge" as a verb. As a noun it means "letting pass without notice," or "lack of attention and due care," or "lack of care and attention."

The jury was instructed on "Oppression" that it meant "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." Exhibit A: ft. 7. "Cruel" means "heartless" (deficient in kindness or compassion or mercy) or “Able or disposed to inflict pain and suffering,”or “causing suffering and pain,” or “causing suffering.” “Unjust” has synonyms of “partial”or “unfair,” and its possible different definitions are given as “not fair,” or “lacking in fairness,” or “brutally unfair” or “harsh,” or “violating principles of justice,” or “not adhering to ethical or moral principles.”

The jury was instructed that “despicable conduct” meant “conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.” Exhibit A: 15, ft. 7. “Vile” has synonyms of “abhorrent,” or “bestial,” or “charnel”, or “crying,” or “despicable,” or “detestable,” or “disgustful,” or “disgusting,” or “distasteful,” or “egregious,” or “flagrant,” or “foul,” or “ghastly,” or “ghoulish,” or “gross,” or “hideous,” or “horrid,” or “loathly,” or “loathsome,” or “morbid,” or “nauseating,” or “ nauseous,” or “noisome,” or “objectionable,” or “obnoxious,” “obscene,” or “outrageous,” or “rank,” or “repellant,” or “repellent,” “ or “repugnant,” or “repulsive,” or “revolting,” or “scrimy,” or “sepulchral,” or “sickening,” or “swinish,” or “unpleasant,” or “verminous,” or “yucky” with adjective meanings of “causing or able to cause nausea,” “of the most contemptible kind,” or “morally reprehensible,” or “thoroughly unpleasant.” “Base” has definitions of “morally reprehensible,” or “not of the nobility,” and an archaic meaning: “of the most contemptible kind.” “Contemptible” has a definition of “deserving of contempt or scorn” and a synonym of “unworthy.” “Contempt” means “lack of respect accompanied by a feeling of intense dislike,” or “open disrespect for a person or thing,” or “a willful disobedience to or disrespect for the rules of court.”

"Scorn" means "lack of respect accompanied by a feeling of intense dislike," or "open disrespect for a person or thing" and it has no synonyms. "Miserable" means "very unhappy," or "full of misery,"or "deserving or inciting pity," or "of the most contemptible kind;" or "of very poor quality or condition," or "characterized by misery," or "contemptibly small in amount," with synonyms of "bad," or "homesick," or "lovesick," or "nostalgic," or "regretful," or "sorry," or "woeful," or "wretched." "Wretched," means "of very poor quality or condition;" or "very unhappy;" or "full of misery," or "deserving or inciting pity;" or "characterized by misery" with synonyms of "bad," or " base," or "bum," or "cardboard," or "cheap," or "cheesy," or "chintzy," or "coarse," or "coarsened," or "commercial," or "common," or "crude," or "crummy," or "deplorable," or "execrable," or "flimsy," or "less," or "low-grade," or "mediocre," or "miserable," or "poor," or " punk," or "ropey," or "scrawny," or "scrubby," or "second class," or "second-rate," or "shoddy," or "sleazy," or "stunted," or "tatty," or "tawdry," or "third-rate," or "tinny," or "utility," or "utility-grade," or "woeful." "Loathsome" means "unwholesome," or "arousing aversion or disgust" with synonyms of "insalubrious," or "insubstantial," or "jejune," or "morbid," or "noisome, " or "noxious," or "offensive," or "unhealthful," or "unhealthy." "Despised" means as a verb,"look down upon" and it has no synonyms.

The jury was further confused as the punitive damage instruction implied that those damages should be imposed on the attorney as he was a real estate broker, even though in the investment transaction involved, he was not acting as a real estate broker. Thus, the jury was instructed on the Breach of Fiduciary Duty cause of action that, "A fiduciary or a confidential relationship exists whenever under the circumstances trust and confidence reasonably may be and is reposed by one person in the integrity and fidelity of another. A fiduciary relationship arises in, among other situations, the relationship between an attorney and client, the relationship between a real estate broker and lender or borrower." Exhibit 624 contained in the State Bar's July 28, 1997 filed, endorsed "Submission of Jury Instructions Given in James v. Kittrell, O,C.S.C. Case No. 78730 filed with the Hearing Department by the Office of Trials. The punitive damage instruction stated that if the jury found there was oppression, malice, or fraud in the conduct of either a breach of fiduciary duty or fraud that such damages could be awarded. Exhibit A: 15: ft.7. With the misleading jury instruction on breach of fiduciary duty, and the probability that punitive damages were imposed because the attorney is a real estate broker, nothing clear and convincing can be derived from the punitive damage award. The variable meanings to the terms involved in the punitive damage instructions could cause a jury to impose them because the defendant is a real estate broker who committed an act that was yucky.

This makes the Opinion an error of law as it can not conclude that malice, or oppression, or fraud as a grounds for imposing punitive damages in a civil suit is in any way similar or analogous to the limited meaning of liability for an act of moral turpitude in a quasi-criminal proceeding. Taking damages and claiming those are the merits in a quasi-criminal proceeding is fundamentally unfair. Damages are not merits nor vice versa. They are different. They are distinct, and it denies due process of law to claim they are equivalent, comparable or similar.

The Opinion takes vagueness and compounds into a hundred more vagueness variables which denies due process of law. An accused has no notice of the conduct proscribed or required by the term "act of moral turpitude." A term that had no core now has no apple. The indefinite is now translated into the ephemeral. **Connolly v. General Constr. Co.** (1926) 269 U.S. 385, 391; 70 L. Ed. 322; 46 S. Ct. 125. Without advance warning, words with many different meanings, to wit, malice, or oppression, are included in the inherently vague and ambiguous term "act of moral turpitude." Exhibit E: 17-19. An act of moral turpitude has been rejected by the American Bar Association as a grounds for discipline of an attorney due to its ambiguity and vagueness." The American Bar Association stated the following, "the Model Rules also eliminate the troublesome `moral turpitude' standard... This standard has been broadly defined As "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." That the standard was manifestly ambiguous is evidenced by the wide ranging interpretations given it by the courts." A.B.A. Annotated Model Rules, Rule 8.4, Misconduct, Comment, at 353.

In **Smith**, at footnote 9, page 41, in reference to imposing punitive damages by reason of a standard of reckless indifference, the United States Supreme Court stated that one "cannot transform indifference, conscious or otherwise, into intent. (at footnote 12, page 46, "...[C]ases actually offer unequivocal support for the rule that punitive damages are available on a showing of negligence, recklessness, disregard for or indifference to the rights of others, and various other standards short of actual ill will or injurious intent." Following **Smith**, the United States Supreme Court held in **Dun & Bradstreet v. Greenmoss Builders** (1985) 472 U.S. 749 that actual malice was not required for the imposition of punitive damages. As stated there, "....'[T]he alleged deterrence achieved by punitive damages awards is likely outweighed by the costs-such as the encouragement to unnecessary litigation and the chilling of desirable conduct-flowing from the rule, at least when the standards on which the awards are based are ill-defined. (**Smith v. Wade** 461 U.S. 39, 59 (Rehnquist, J .dissenting)."

The United States Supreme Court made clear that damages are not the merits, contrary to the contention of the Review Department that it may take a damage award in a civil suit and find this is the merits in a quasi-criminal proceeding and therefore deny to an accused his constitutional rights to a trial. In **Smith**, the defendants argued that not requiring a higher standard for punitive damages than that required for a finding of liability and having both be based on recklessness would not deter corrections officers which is the purpose of punitive damages. The United States Supreme Court in **Smith**, at 50, stated the following:

> "....[The defendants] argument for certainty in the interest of deterrence overlooks the distinction between a standard for punitive damages and a standard of liability in the first instance. .... [W]e ... hope .. that most officials are guided by the underlying standards of federal substantive law.... [T]he conscientious officer who desires clear guidance on how to do his job and avoid lawsuits can and should look to the standards for actionability in the first instance."

The Opinion's conclusive finding that a punitive damage award in a civil lawsuit is *ipso facto* an act of moral turpitude relies on six disparate and unrelated decisions. Exhibit A: 16:13-14, 17, para. 2, 15-21. All of the citations in the Opinion involve theft of funds with the exception of the sixth case which stands for the proposition that an act of moral turpitude can not be found when an attorney is convicted of a crime which does not require a specific intent to defraud in order to convict the accused. Four of the citations are criminal conviction cases. The other two involve theft of client funds, which is also a crime. There is no suggestion in this case that a punitive damage award in a civil lawsuit involves any specific intent or any specific intent to defraud or a crime unlike all of the six cases cited in the Opinion.

For the Opinion's claim that any act of baseness, vileness, or depravity is an act of moral turpitude, it relies on dicta in **In re Craig**, (1938) 12 Cal.2d 93, at 97 appearing at Exhibit A:. 16, para 1, 20-23. This case involved a judge who was criminally convicted of conspiring to obstruct and impede the due administration of justice. For its claim that, "any crime or misconduct without excuse or any honest or immoral act," appearing at Exhibit A:. 16, para. 1, 23-26, it relies on dicta from **Chadwick v. State Bar** (1989) 49 Cal.3d. 103, 110. The attorney was criminally convicted of the federal misdemeanor crime of violating federal statutes prohibiting insider trading. He was also charged with fraud and misrepresentation in lying to federal authorities about his criminal act. The Opinion's claim that "conduct which indicates that an attorney is unable to meet the professional or fiduciary duties of his practice may show him or her to be unfit to practice and constitute moral turpitude," is dicta taken from **In re Strick** (1983) 34 Cal. 3d. 891, 901, and appears at Exhibit A: 17, para. 1, 1-3. The attorney was convicted of killing a person.

The two non-criminal conviction cases involve findings of theft of client funds, fraud, or of a business transaction violation. None of those cases have any similarity to the facts at issue or the charges in this case. In this case the jury split 9 to 3 under the low preponderance of the evidence standard of proof and a reckless instruction for fraud and there were no jury instructions, as the Opinion admits, concerning any alleged business transaction with a claimed client in this case and no such findings may be made. **Lipson v. State Bar** (1991) 53 Cal. 3d. 1010, 1020, cited at Exhibit A:17: para. 1, states that, "The review department concluded that by willfully misappropriating his client's funds, petitioner committed an act of moral turpitude and thereby violated section 6106. Petitioner does not contest this conclusion of law; he contests only the underlying finding of willful misappropriation that we uphold. This finding alone supports the conclusion of moral turpitude, and thereby the violation of section 6106. The lack of an evil intent will not immunize an attorney from a conclusion of moral turpitude when the attorney's actions constitute gross carelessness and negligence violating the fiduciary duty to a client. **(Murray v. State Bar, supra,** 40 Cal.3d at p. 582.)." The opinion's assertion that **Lipson** stands for the proposition that, "...[A]n attorney's deliberate breach of a fiduciary duty to a client involves moral turpitude as a matter of law, " and "...[E]ven an attorney's non-deliberate breach of fiduciary duty to a client involves moral turpitude if the breach occurred as a result of the attorney's gross carelessness and negligence," is an incorrect citation to

Lipson. **Lipson** involves a finding of moral turpitude based on theft of client funds. This is a crime. The case has nothing to do with a civil verdict concerning a failed investment of a non-client. The Opinion states there is insufficient evidence to establish that the investor was a client. Exhibit A:19: para. 3, 14-26, 20, 1-2, para. 1-13. There is no claim to any misappropriation of any funds. There is no suggestion of any crime involved in the civil lawsuit.[3]

The citation in the Opinion to **Worth v. State Bar** (1976) 17 Cal. 3d 337, 341 is also incorrect and taken out of its limited context. While the Opinion asserts that it stands for the proposition that, "[a]n attorney who accepts responsibility of a fiduciary nature is held to the high standards of the legal professional whether or not he acts in his capacity of an attorney," the decision in **Worth**, at 340, actually states that, "When petitioner again failed to respond to her letters, Mrs. Holzhauer instituted a civil action against him for fraudulent misrepresentation and rescission of contract based on petitioner's failure to obtain a permit from the Corporations Commissioner prior to selling an interest in a limited partnership. After a jury trial, judgment was entered in Mrs. Holzhauer's favor for

---

[3] The Opinion also cites an uncitable case involving Attorney Rubens. California Rules of Court, Rule 977 (a)Rule 977 (a) states that, "An opinion that is not ordered published [by the California Supreme Court] shall not be cited or relied on by a court or party in any other action or proceeding...." The knowing use of such a citation is a violation of the Rules of Professional Conduct for attorneys. (See Rules Prof. Conduct, rule 7-105rule 7-105). The California Code of Judicial Conduct applicable to State Bar judges requires that they "follow the law."

$25,000 compensatory damages, $3,880 interest, and $7,500 punitive damages. Petitioner did not appeal....The local committee found: (1) Having accepted Mrs. Holzhauer's investment, he owed her fiduciary duties and breached those duties by failing to prepare an instrument setting forth the parties' rights, by commingling funds, and by failing to account. (2) Petitioner misrepresented his ownership of two of the parcels of property but believed his option to purchase the property owned by the Department of Public Works and his association with the Wilsons virtually constituted ownership. Petitioners' representations were "grossly negligent." And, (3) Mrs. Holzhauer relied on petitioner's experience and knowledge. ...In his three-page petition for writ of review, petitioner claims that he did not owe any fiduciary duty to Mrs. Holzhauer, alleging that he was a seller of a property interest who could use the sale proceeds for his private purposes. An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity of an attorney. He must maintain proper books of account and records of transactions, and he may not commingle client's funds or use them for personal purposes. (Id., at p. 713); **Simmons v. State Bar** (1969) 70 Cal.2d 361, 365; 74 Cal.Rptr. 915, 450 P.2d 291; **Clark v. State Bar** (1952) 39 Cal.2d 161, 166-170; 246 P.2d 1.)" Once again, you have theft of client funds, which is a crime, and not just a failed investment. **Worth**'s citation to **Beery v. State Bar** (1987) 43 Cal. 3d. 802, 813. Exhibit A: 17: para. 1, 14 is also irrelevant as the attorney borrowed money from a client and fraudulently guaranteed a loan without complying with the business transaction rule. In this case, the Opinion admits there are not sufficient facts to support a finding of a business transaction with a client. Exhibit A: 19;15-26, 20:1-2, para. 2:3-10.

The Opinion's claim that "an attorney's guilt of malice, oppression, or fraud with respect to his commission of an act of fraud, even in the absence of a fiduciary relationship, involves moral turpitude as a matter of law," which cites **In re Hallinan** (1954) 43 Cal. 2d. 243, 247-248, is a claim without any citation for its authority. **Hallinan** does not state such a proposition. **Hallinan** states the opposite. The attorney's conviction of the crime of "willfully and knowingly filing false and fraudulent income tax returns" was held to not necessarily involve moral turpitude as specific intent to defraud was not an essential element of the crime as opposed to willfulness. Thus, while "some measure of bad faith or evil intent is an essential element [of the crime], ... which can be inferred from evidence that the defendant acted without justifiable excuse, without ground for believing his acts were lawful, or in careless disregard of the lawfulness of his acts," [this] does not necessarily involve moral turpitude." **Hallinan** at 252. Contrary to the Opinion's claim, there is no mention of punitive damages findings of malice, oppression, or fraud establishing moral turpitude and the decision supports the claim that those findings in a punitive damages award are not moral turpitude as a matter of law.

The case of **In re Hallinan** (1954) 43 Cal. 2d. 243 is more instructive in demonstrating that the Opinion's claim that a punitive damage award in a civil lawsuit is *ipso fact* an act of moral turpitude is an error of constitutional law. In **In re Hallinan,** the attorney was convicted of five counts of "willfully and knowingly filing false and fraudulent income tax returns. (26 U.S.C. section 145, subd. (b)." The attorney was sentenced to 18 months imprisonment on each count and fined $50,000.00. The State Bar Act statute in effect at the time provided for summary disbarment for conviction of a felony or a misdemeanor involving moral turpitude. This Court denied the petition for summary disbarment and referred the matter back to the State Bar for a hearing and report. In doing so, it stated the following:

> "Although the problem of defining moral turpitude is not without difficulty (see **In re Hatch**, 10 Cal.2d 147, 151 [73 P.2d 885; dissenting opinion of Mr. Justice Jackson in **Jordan v. De George**, 341 U.S. 223, 232 [71 S.Ct. 703, 95 L.Ed. 886; **Schmidt v. United States**, 177 F.2d 450, 451), it is settled that whatever else it may mean, it includes fraud and that a crime in which an intent to defraud is an essential element is a crime involving moral turpitude. (**Jordan v. De George, supra**, 341 U.S. 223, 227; **United States v. Reimer**, 113 F.2d 429, 431; **United States v. Day**, 51 F.2d 1022; **In re Crane** [Cal.], 189 P. 1072; see also **Ex Parte Wall**, 107 U.S. 265, 273 [2 S.Ct. 569, 27 L.Ed. 552]; **People v. Wisecarver**, 67 Cal. App.2d 203) [4] It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude. (**In re Rothrock**, 25 Cal.2d 588 [154 P.2d 392] [petty theft]; **Werner v. State Bar**, 24 Cal.2d 611; [150 P.2d 892] [attempted bribe and grand theft]; **Moura v. State Bar**, 18 Cal.2d 31 [112 P.2d 629] [forgery]; **Suspension of Hickman**, 18 Cal.2d 71 [113 P.2d 1] [grand theft]; **In re McAllister**, 14 Cal.2d 602 [95 P.2d 932] [conspiracy to violate the General Cemetery Act by misrepresenting cemetery lots offered for sale]; **Barton v. State Bar**, 2 Cal.2d 294 [40 P.2d 502]

[attempted extortion]; **Oster v. State Bar**, 2 Cal.2d 625 [42 P.2d 627] [misappropriation of a client's funds]; **In re Shinn** [Cal.], 186 P. 772 [forgery]; **Matter of Coffey**, 123 Cal. 522 [56 P. 448] [attempted extortion]; **In re Thompson**, 37 Cal. App. 344, 348 [174 P. 86] [knowingly receiving property stolen from the mails]; see also **In re Rothrock**, 16 Cal.2d 449, 454 [166 P.2d 907, 131 A.L.R. 226].) The fraudulent acquisition of another's property is but another form of theft in this state. (Pen. Code, § 484.) [5] We see no moral distinction between defrauding an individual and defrauding the government (**United States v. Reimer, supra**, 113 F.2d 429, 430-431), and an attorney, whose standard of conduct should be one of complete honesty (**McGregor v. State Bar**, 24 Cal.2d 283, 288-289 [148 P.2d 865]), who is convicted of either offense is not worthy of the trust and confidence of his clients, the courts, or the public, and must be disbarred, since his conviction of such a crime would necessarily involve moral turpitude.

Conversely, if a conviction for any crime can be had without proof of facts showing moral turpitude, an attorney convicted of such a crime cannot be summarily disbarred under sections 6101 and 6102 of the Business and Professions Code. Moral turpitude must be inherent in the commission of the crime itself to warrant summary disbarment under those sections. As we said in **In re Rothrock**, 16 Cal.2d 449, 454 [106 P.2d 907, 131 A.L.R. 226], an `attorney's name will not be stricken from the rolls where the nature of the particular crime does not reflect a bad moral character with respect to the duties of the attorney's profession.' [Italics added.] (See **In re McAllister, supra**, 14 Cal.2d

602, 603-604.) [8] The language of the statute itself clearly indicates that an attorney can be summarily disbarred only when the crime of which he was convicted involves moral turpitude. Even if it is assumed that statements in the indictment or judgment of conviction describing conduct that goes beyond the essential elements of the crime charged are a part of the "record of conviction," as the State Bar contends, the record of conviction is "conclusive evidence" only when the crime itself necessarily involves moral turpitude. The provision that the record of conviction is conclusive evidence was inserted in the statute in order that this court could disbar an attorney, convicted of a crime involving moral turpitude, without giving him further notice or hearing. **In re Collins**, 188 Cal. 701, 703, 706-708 [206 P. 990, 32 A.L.R. 1062]... Only when an attorney is indicted for a crime the commission of which would in every case evidence a bad moral character, is the issue of moral turpitude tendered in the criminal trial. If an attorney could be summarily disbarred after conviction for a crime, the minimum elements of which do not involve moral turpitude, he would never have an opportunity to be heard on the issue on which his disbarment depends. We must assume that every jury in a criminal trial is properly instructed to convict the defendant if they find the minimum elements of the offense charged, and it would be mere speculation to conclude in any case that a jury finds a defendant guilty of conduct alleged in the indictment, proof of which is unnecessary to his conviction, merely because the jury brought in a verdict of guilty.

The crucial question in the present proceeding, therefore, is whether or not an intent to defraud the United States is an essential element of the crime proscribed by section 145, subdivision (b), of the Internal Revenue Code. If an intent to defraud is not an essential element and a person may be convicted thereunder without proof of that intent or other conduct evidencing moral turpitude, an attorney convicted of that crime cannot be summarily disbarred. Since section 145, subdivision (b), is a United States statute, we must accept the interpretation given it by the United States courts. **Urie v. Thompson**, 337 U.S. 163, 174 [69 S.Ct. 1018, 93 L.Ed. 1282]; **Anderson v. Atchison, T. & S. F. Ry. Co.**, 31 Cal.2d 117, 121-122 [187 P.2d 729]; **Caminetti v. Imperial Mutual Life Ins. Co., supra**, 59 Cal. App.2d 476, 490; see also **Hayashi v. Lorenz**, 42 Cal.2d 848, 852 [271 P.2d 18]; Op. Atty. Gen., No. 54/37, June 4, 1954, pp. 6-7.)

These courts have definitely held that an intent to defraud is not an essential element of section 145, subdivision (b), and that a conviction under that section does not necessarily involve moral turpitude. In **United States v. Scharton**, 285 U.S. 518 [52 S.Ct. 416, 76 L.Ed. 917], the defendant was indicted for violating section 1114(b) [now § 145, subd. (b)] for attempting to evade taxes by falsely understating taxable income. He contended that the general three-year period of limitations had expired and that the prosecution was therefore barred. The United States contended, however, that the special six-year statute of limitations applicable to offenses involving fraud or attempts to defraud the government was controlling. It urged, as the

State Bar does in the present proceeding, that "fraud is implicit in the concept of evading or defeating; and [that] ... [a]ny effort to defeat or evade a tax is ... tantamount to and ... possess[es] every element of an attempt to defraud the taxing body." (285 U.S. 518, 520-521.) The Supreme Court noted that many statutes expressly make an intent to defraud an essential element of the offense, and that under these statutes "an indictment failing to aver that intent would be defective; but under § 1114(b) such an averment would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat. (Citation.)" (285 U.S. 518, 521.) The court held that the general three-year statute of limitations covering offenses not involving fraud was applicable. Subsequently the **Scharton** case was relied upon in holding that a statute (18 U.S.C.A. § 3287) suspending the statute of limitations during the period of hostilities in World War II for offenses "involving fraud or attempted fraud against the United States" did not apply to a violation of section 145, subdivision (b). (**United States v. Beard**, 118 F. Supp. 297, 303.) It has also been held that the crime stated in section 145, subdivision (b), is not an offense involving 'moral turpitude' for purposes of a statute (8 U.S.C. § 1251, subdivision (a)(4)) authorizing the deportation of resident aliens twice convicted of such offenses. (**United States v. Carrollo, supra**, 30 F. Supp. 3, 7; see also **United States v. Neelly, supra**, 208 F.2d 337, 340), and that the offense stated in section 145, subdivision (b), is not "inherently a crime," but is a crime malum prohibitum. (**United States v. Pendergast** 28 F.Supp. 601, 609.)

Two years after the decision in the **Scharton** case, the Supreme Court in **United States v. Murdock**, 290 U.S. 389 [54 S.Ct. 223, 78 L.Ed. 381], had occasion to consider the meaning of the word `willfully' in section 145, subdivision (a), of the Internal Revenue Code. fn. * In that case the defendant was indicted for "willfully" refusing to supply information about deductions claimed in his tax returns. He based his refusal on a claim of privilege against self- incrimination under state statutes, but the court had held on an earlier appeal (**United States v. Murdock**, 284 U.S. 141 [52 S.Ct. 63, 76 L.Ed. 210]) that the privilege could not be invoked. In defining the word `willfully' the court said that it 'denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with bad purpose [citations]; without justifiable excuse [citations]; stubbornly, obstinately, perversely [citations]. The word is also employed to characterize a thing done without ground for believing it is lawful [citation], or conduct marked by careless disregard whether or not one has the right so to act [citations].' The court held that although the defendant's refusal to supply information was without legal justification, 'the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.' (290 U.S. 389, 394, 398 [54 S.Ct. 223, 78 L.Ed. 381]; see also **Arnold v. United States**, 75 F.2d 114, 145-146.) A similar definition of the word 'willful' as used in section 145, subdivision (b), has been given in a number of cases. (See **Spies v. United States**, 317 U.S. 492, 497 [63 S.Ct. 364, 87 L.Ed. 418]; **United States v. Martell**, 199 F.2d 670, 672; **Hargrove v. United States**, 67 F.2d 820, 823 [90 A.L.R. 1276].)

The foregoing cases establish that fraud is not an essential element of the offense proscribed by section 145, subdivision (b), that some measure of bad faith or evil intent is an essential element, but that such bad faith or evil intent, which can be inferred from evidence that the defendant acted without justifiable excuse, without ground for believing his acts were lawful, or in careless disregard of the lawfulness of his acts does not necessarily involve moral turpitude....

Although every conviction for violating section 145, subdivision (b), may not involve moral turpitude, some convictions may. In such cases discipline or disbarment should be imposed by nonsummary procedures. (Bus. & Prof. Code, § 6106 et seq.) When, as in the present case, it appears that an attorney, whose conviction does not warrant summary disbarment, might nevertheless have been guilty of acts involving moral turpitude, we have established the practice of referring the matter to the State Bar for an investigation of the question whether in the commission of the crime the convicted lawyer was guilty of misconduct that requires his suspension or disbarment. (**In re Rothrock, supra**, 16 Cal.2d 449, 454; **In re Richardson**, 15 Cal.2d 536, 541 [102 P.2d 1076]; **In re Boyd**, Bar Misc. 2205, Minute Order, March 17, 1954.). This court has inherent power over the admission, suspension, and disbarment of attorneys Johnson v. State Bar, 4 Cal.2d 744, 758 [52 P.2d 928]; **In re Lavine**, 2 Cal.2d 324, 327-328 [41 P.2d 161, 42 P.2d 311]), and in the exercise thereof can initiate disciplinary proceedings on its own motion (Bus. & Prof. Code § 6107) and, in so doing, it may adopt "any suitable process or mode of proceeding. ..." (Code Civ. Proc., § 187; and see **Barnes v. District Court of Appeal**, 178 Cal. 500, 504 [173 P. 1100].)"

The Opinion has no authority for its claim that a punitive damage award in a civil lawsuit is *ipso facto* an act of moral turpitude. Even the conviction of a crime which does not require a finding of a specific intent to defraud is not necessarily moral turpitude as **In re Hallinan** (1954) 43 Cal. 2d. 243 makes clear. The Opinion's claim a civil damage award is the merits of a quasi-criminal proceeding and is an act of moral turpitude is contrary to well-established law and has no legal basis for its conclusion.

The attorney is required to be exonerated of the moral turpitude and business transaction charges as the charges filed and tried were admittedly not proven by clear and convincing evidence; the changing of the moral turpitude charge after the trial by the Review Department requires dismissal of that charge; and it denies due process and equal protection of the law as well as violating the double jeopardy clause to make a verdict first and then remand to find facts to support a verdict already made.

V.

The Application of Collateral Estoppel was an Error of Law that Denied Due Process and Equal Protection of the Law

A. The Issue of Punitive Damages was not Identical to the Moral Turpitude Issue

As stated in **Brosterhaus v. State Bar** (1995) 12 Cal. 4th 315, "This court has indicated that a final decision in an administrative adjudication may be given *res judicata* or collateral estoppel effect in a subsequent judicial proceeding if the issues were identical in the administrative proceeding. (**People v. Sims** (1982) 32 Cal.3d 468, 485 [186 Cal. Rptr. 77, 651 P.2d 321].) It may do so if the agency was acting in a judicial capacity and resolved disputed issues of fact which the parties had adequate opportunity to litigate. (Id. at p. 479). Assuming, arguendo, that the State Bar arbitration was equivalent to an administrative adjudication, however, the complaint in this action does not establish on its face that the issues in the State Bar arbitration were identical, or were issues that plaintiffs had an adequate opportunity to litigate in the arbitration."

The Opinion finds culpability of an act of moral turpitude by claiming that a damage award in a civil suit decides those merits in the quasi-criminal proceeding. The issues are not identical, such that collateral estoppel could not constitutionally be applied to bar trial. The issues that may be given preclusive effect from one proceeding to another are not those which are in "common," as claimed in the Opinion. Exhibit A: 14, para 2, 22-25.[4] The Opinion's claim that, "We must first determine if there are any issues that are common to the James' lawsuit and the present disciplinary proceeding." Exhibit A:. 14, para 2, 22-25.

---

[4] The Opinion asserts at 14, para 2, 25-26, then "Then [we] determine whether [the issues that are common] were previously adjudicated...under the clear and convincing standard of proof and whether they are necessary to support the civil judgment." It then states at 15,1-5, that "Then we can give them preclusive effect and use them to find the corresponding element or elements of the charged disciplinary violations or alleged aggravating circumstances."

The Word for Windows 98 Thesaurus indicates that synonyms for the word "common" which is a word not used by Courts in considering the application of collateral estoppel, are "customary," "familiar," "ordinary," regular" and defines "common" as an adjective to mean "relating to the community as a whole," or "commonly encountered," or "common to or shared by both or all of two or more parties," or "of ordinary or inferior quality or value," "lacking refinement or taste," "or of or associated with the great masses of people."

As held in **Grogan v. Garner** (1991) 498 U.S. 279, at 285, the United States Supreme Court has held that if the issue of fraud is tried based on a burden of proof of preponderance of the evidence, and "the clear and convincing standard applies [to the instant case]..., the prior judgment could not be given collateral estoppel effect." That disposes of this case and the unconstitutional application of collateral estoppel in this case.

For collateral estoppel to apply, the issue must be the same or identical, not one which may be in common as claimed in the Opinion. "The matter raised in the second suit must be identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." **Tait v. Western Md. R. Co.** 289 U. S. 620, 624, 707. The point of question must have been actually litigated and determined. **Cromwell v. County of Sac,** 94 U.S. 351, 352-353, quoted in **Partmar Corp. v. Paramount Corp.** (1954) 347 U.S. 89, at 91. Preclusion may only apply when the matters were actually presented and determined in the first proceeding. **U.S. v. International Building Co.** 345 U. S. 502 (1953), at 506. The issues must be those that were actually litigated and determined. **Lawlor v. National Screen Service** (1955) 349 U.S. 322. For preclusion to apply, it is limited to the determinations of fact, and mixed fact and law, that were essential to the decision. **Commissioner v. Sunnen** 333 U.S. 591, 601. Preclusion only applies when the first proceeding establishes one of the ultimate facts in the second proceeding. **Commissioner,** at 600. For preclusion to apply, the first proceeding must "necessarily resolve the issue" in the second. **One Lot Emerald Cut Stones v. United States** (1972) 409 U.S. 232. For preclusion to apply it only applies to an issue that is actually and necessarily determined. **Montana v. United States** (1979) 440 U.S. 147, at 153. Collateral estoppel only applies to a right, question or fact distinctly put in issue and directly determined in the first proceeding. **Southern Pacific R. Co. v. United States** (1897) 168 U.S. 1, 48-49.

The Opinion's claim that issues affecting great masses of people or that are ordinary in one proceeding preclude defense in another is irrational and contrary to well-established law. The Opinion admits it can find no facts from the first proceeding that were necessarily put at issue in the second proceeding. This also means that no facts can be found concerning the charged offense of an act of moral turpitude. Since the Opinion admits that the first proceeding yields no facts which could be subject to collateral estoppel, its conclusion is unconstitutional that collateral estoppel applies to the moral turpitude claim. It also admits that there are no identical or same issues. Its' claims that malice or oppression or fraud in a punitive damage award is the same as an act of moral turpitude is refuted by the case law the opinion cites, by common sense, and by the many different and varying meanings to those terms.

B. The Differing Purposes of Punitive Damages and Attorney Disciplinary Proceedings Precludes the Application of Collateral Estoppel

Collateral estoppel does not apply when the purposes of the two proceedings are different and distinct. Since there was no notice of any claim that a punitive damage issue in a civil case would be claimed to conclusively establish the merits of a quasi-criminal proceeding, the accused was foreclosed from his due process right to challenge the constitutionality of taking damages and claiming they establish merits and claiming that the purpose of civil law damages is the same as the purpose in an attorney disciplinary proceeding.

As stated in **Most v. State Bar** (1967) 67 Cal. 2d. 589, 595, fn. 5, the purpose of civil proceedings and State Bar proceedings is not the same. This Court held in **Bernstein v. Committee of Bar Examiners** (1968) 69 Cal. 2d. 90, at 101, "The findings in the civil action are not binding upon this court. (cf. **Lefner v. State Bar**, 64 Cal.2d 189, 192 [49 Cal. Rptr. 296, 410 P.2d 832]." The following cases of this Court establish that civil findings are not binding in State Bar proceedings: **Maltaman v. State Bar** (1987) 43 Cal. 3d. 924, **Rosenthal v. State Bar** (1987) 43 Cal. 3d. 612, 634, **Mushrush v, State Bar** 17 Cal. 3d. at 489, fn. 1; **Yokozeki v. State Bar** 11 Cal. 3d. At 444; **In re Wright** (1973) 10 Cal. 3d. 374, 377; **Lee v. State Bar** (1970) 2 Cal. 3d. 927, 941; **Bernstein v Committee of Bar Examiners** (1968) 69 Cal. 2d. 90, 101; **Lefner v. State Bar** (1966) 64 Cal. 2d. 189, 192; **Magee v. State Bar** (1962) 58 Cal. 2d.

423, 429. The issues are not the same nor are the parties to the proceedings. [5]

In determining that collateral estoppel does not apply in State Bar proceedings to preclude the accused attorney defending his license to practice law based on civil law findings, this Court analyzed the disparity and differences in the two proceedings and why collateral estoppel should not be applied in an attorney disciplinary proceeding in **Maltaman, supra**, at 947, as follows: "The State Bar Court noted the civil determination that petitioner committed fraud and undue influence in the Spang case, but the civil verdict and judgment have no disciplinary significance apart from the underlying facts.....`[S]substantial evidence' to support the civil judgment is not necessarily `convincing proof . . . to a reasonable certainty,' which we must find in order to impose discipline."

---

[5] As stated by the State Supreme Court in **Gikas v. Zolin** 6 Cal. 4th 841; 863 P.2d 745; 25 Cal. Rptr. 2d 500 (1993), at 848, "In general, collateral estoppel precludes a party from relitigating issues litigated and decided in a prior proceeding. (**People v. Sims** (1982) 32 Cal.3d 468, 477 [186 Cal. Rptr. 77, 651 P.2d 321]; **Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.** (1962) 58 Cal.2d 601, 604 [25 Cal. Rptr. 559, 375 P.2d 439])... Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (**Lucido v. Superior Court** (1990) 51 Cal.3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223, 2 A. L. R. 5th 995].) Even if these threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles. (at p. 339)." The issues are diametrically different and not, as required the same issue. The civil case was tried based on a claim to the unwisdom of an investment for an investor who was a stranger to the attorney. It did not concern a business transaction ethical rule concerning an attorney entering into a business transaction with an existing client. There was no mention of such a rule or an issue, yet that comprises counts one, two, and four in their entirety of the instant notice and proceeding. There also was no mention of moral turpitude, which comprises all of count three.

The purpose of an attorney disciplinary proceeding is to determine whether an attorney has violated rules of professional conduct and whether he should be sanctioned concerning his right to work as a result in order to protect the public from an unfit practitioner. The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (**Chadwick v. State Bar** (1989) 49 Cal 3d 103, 111; **Cooper v. State Bar** (1987) 43 Cal 3d 1016, 1025; standard 1.3). While the purpose of attorney disciplinary proceedings is not to punish the attorney, the purpose of punitive damages is exactly the opposite, to wit, to punish the defendant. The United States Supreme Court has held that punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." **Gertz v. Robert Welch, Inc.**, (1974) 418 U.S. 323, 350, **Electrical Workers v. Fount** (1979) 442 U.S. 42. Since the purpose of the punitive damage award in a civil proceeding upon which the Opinion asserts it finds conclusively, without a trial or hearing, an act of moral turpitude, is exactly the opposite of the purpose of the attorney disciplinary proceedings and the finding of an act of moral turpitude, the claim of collateral estoppel is unconstitutional as the purpose behind the two issues is exactly the opposite of each other.

The claim that a damage award is the merits of another proceeding not only has no support in the law, it is contrary to the principles of notice and opportunity to appear and defend. Parties prepare and litigate merits. Damages are a collateral issue. It is unfair to a litigant to apply collateral estoppel to a damage issue in a civil proceeding and claim it conclusively establishes the merits of professional misconduct by an attorney in a quasi-criminal proceeding wherein the right to work is at issue. The requirement of identical issue is violated by the Opinion's claim that damages issues are the merits of another proceeding. **Tait v. Western Md. R. Co.** 289 U. S. 620, 624, 707.

C. The Evidentiary Standard that Requires that "All intendments inFavor of the Accused Attorney" Precludes a Civil Law Damage Verdict Collaterally Estopping an Accused's Defense to the Merits Of a Quasi-Criminal Attorney Proceeding

The Opinion errs in claiming that the attorney asserts no specific unfairness in the application of collateral estoppel, in claiming that the civil punitive damage verdict was tried on the same burden of proof as required in the State Bar proceeding, and in asserting that a common issue permits the application of collateral estoppel. It also errs as a matter of law in citing and relying on its own opinions which are constitutionally and by Rule of Court prohibited to be cited by any party or tribunal. Exhibit A: 11, para 1, 4-26, 12-14, 18,20,22.[6]

---

[6] Pursuant to **Article 6, section 14** Article 6, section 14Article 6, section 14 of the California Constitution, "The legislature shall provide for the prompt publication of such opinions of the Supreme Court and Courts of Appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Pursuant to California Rules of Court, Rule 977**Rule 977** Rule 977 which states "[Unpublished opinions] An opinion that is not ordered published [by the California Supreme Court] shall not be cited or relied on by a court or a party in any other action or proceeding... (with exceptions not applicable)." The Opinion's reliance on cases involving Applicant A, and Attorneys Berg, Stewart, Acuna, Stewart, Wright , and Rubens is prohibited. Such cases are not permitted under the State Constitution to be published and the Rule of Court prohibits this party and this tribunal from citing or relying on them. It appears to be both judicial misconduct as a "refusal to follow the law" and disbarable misconduct as "an artifice, fraud, and deceit, " to cite or rely on such cases. As such, the attorney deems that he is precluded from doing so. No local standard of the State Bar may stand as it is superseded by the California Constitution and by the express provision of the California Rules of Court prohibiting such citation and reliance.

It would deny to the Petitioner the equal protection of State Law and the due process of law to decline to follow the law prohibiting citation or reliance on non-citable cases. As held in **Connolly v. Union Sewer Pipe Co**.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431**Connolly v. Union Sewer Pipe Co**.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431**Connolly v. Union Sewer Pipe Co**.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431Connolly v. Union Sewer Pipe Co.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431, no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, and property, and in pursuit of happiness. Reliance on and citation of non-citable cases, when the State Bar and its Court are advisory only, offends the precepts of law prohibiting pre-adjudication publications which prejudge the merits, in addition to being a direct, willful, intentional, and flagrant

The Opinion fails to address the fact that it is an error of law to conclusively find anact of moral turpitude in an attorney disciplinary proceeding based solely on reading a jury verdict on punitive damages in a civil case when the two issues have different burdens of proof. Exhibit A:11, para. 1, 5-14, 16: 1-15.

It is not correct to claim that a civil punitive damage burden of proof of clear and convincing evidence is the same burden of proof in an attorney disciplinary proceeding. It is not. The burdens of proofs which were not addressed in the Opinion are different. Thus, in an attorney disciplinary proceeding, unlike the punitive damage instruction in a civil proceeding, there must be "convincing proof to a reasonable certainty and any reasonable doubts must be resolved in favor of the accused." (**Himmel v. State Bar** (1971) 4 Cal.3d 786, 794, 94 Cal Rptr. 825, 484 P.2d 993; **Zitney v. State Bar** (1966) 64 Cal. 2d 787, 789-790, 51 Cal.Rptr. 825, 415 P.2d 521.) "[R]easonable doubts must be resolved in favor of the attorney." **Price v. State Bar** (1982) 30 Cal 3d 537, 547; **Emslie v. State Bar** (1974) 11 Cal 3d 210, 226. All reasonable doubts are to be resolved in favor of the

---

violation of the Constitutions of the State and of the United **Sheppard v. Maxwell**, 384 U.S. 333, 86 S.Ct. 1507. States. **Sheppard v. Maxwell**, 384 U.S. 333, 86 S.Ct. 1507. **Sheppard v. Maxwell**, 384 U.S. 333, 86 S.Ct. 1507Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507. In addition, it denies to the Petitioner his due process and equal protection rights under the fourteenth amendment to a "meaningful opportunity to be heard in a meaningful manner" as required under **Armstrong v. Manzo** 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d. 62 (1965) **Armstrong v. Manzo** 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d. 62 (1965)Armstrong v. Manzo 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d. 62 (1965).

attorney. (**Alberton v. State Bar** (1984) 37 Cal.3d 1, 11-12 [206 Cal.Rptr. 373, 686 P.2d 1177, A.L.R.4th 1487].) "[A]ll reasonable doubts in favor of the accused [must be made] and if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted." (**Lee v. State Bar, supra**, 2 Cal.3d at p. 939; see also **Zitny v. State Bar** (1966) 64 Cal.2d 787, 790; cf. **Lubetzky v. State Bar, supra**, 54 Cal.3d at p.318). Where the respondent's version is plausible, even when controverted, it supports a reasonable inference of lack of misconduct. (**Davison v. State Bar, supra,** 17 Cal.3d at pp. 573-574.)

Due to the different burdens of proof, the application of collateral estoppel to a jury verdict on punitive damages which did not instruct the jury that all reasonable doubts must be resolved in favor of the attorney; that if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence of the attorney rather than one leading to a conclusion of guilt must be accepted; and which required that the jury consider that where the respondent's version is plausible, even when controverted, it supports a reasonable inference of lack of misconduct," is an error of law and unconstitutional as the Opinion admits that the burdens of proof must be identical and they admittedly were and are not.

For the foregoing lack of identical issue, differing purposes, and different burden of proofs, the Opinion misapplied collateral estoppel to find culpability of an act of moral turpitude resulting in constitutional error of denial of a right to a trial on culpability.

VI.

The Publication of The Advisory and Preliminary Opinion is Unconstitutional

The October 26, 2000 Review Department advisory opinion has typed on it "Public Matter-Designated for Publication." Exhibit A. It was authored by the non-lawyer member of the State Bar's Review Department. It purports to drastically change and create new law. The attorney filed his Motion to Withdraw Publication of Opinion on November 15, 2000. He, thereafter, learned that the State Bar had already released its opinion to the newspapers causing it to be published as a Court opinion in the Los Angeles Daily Journal on November 13, 2000. Exhibit M. No notice of such proposed publication was provided nor any opportunity to be heard in opposition thereto.

The publication is deceptive and offends both the United States and the California Constitution and California law for the following reasons: (1) The constitutional right to privacy contained in the California and the United States Constitution prohibit the State Bar publishing its opinion which is advisory and is subject to a motion for reconsideration and consideration by the California and the United States Supreme Courts and therefore said publication invades the rights to privacy of the attorney in the preliminary stages of a proceeding when no final decision has been made; (2) The California Constitution and the California Rules of Court prohibit the publication of an opinion of the State Bar and its State Bar Court; (3) There is no state law authorizing the State Bar of California to publish any opinions; (4) There is no criteria for publication of a State Bar advisory opinion; (5) The act of publication of an advisory Opinion of the Review Department of the State Bar Court of the State Bar of California is an act of judicial misconduct constituting willful misconduct in office and conduct prejudicial to the administration of justice; (6) The rights to a fair trial and a fair procedure encompassed within the Fifth and Fourteenth Amendments to the United States Constitution prohibit publication of an opinion which taints and impairs the right to a fair trial and a fair procedure. Exhibit M.

A. The Alteration of the Identity of the Tribunal Constitutes a Deceptive and Fraudulent Publication

The State Bar altered the identification of the tribunal for the purposes of its publication. While the proceedings are conducted in a State Bar Court of the State Bar of California and so noticed and pled in each pleading, (refer the Review Department of the State Bar Court of the State Bar of California changed the pleading and the tribunal identification in its advisory opinion to read, "Review Department of the State Bar Court." This confuses and misleads the Public into believing it is a constitutional court of law which issues final decisions when the State Bar Court of the State Bar of California is not. As stated by this Court in **In re Rose** (2000), 22 Cal.4th 430, at 438, "The State Bar Court,.. , is not itself a judicial court established by article VI." "It is an administrative assistant." **In re Attorney Discipline System, supra**, 19 Cal.4th at pp. 599-600.).

As held in **Hirsh v. Justices of the Supreme Court of the State of California** (Ninth Cir. 1995), 67 F.3d 708 "Under California law, attorney disciplinary matters are handled by the State Bar Court ("Bar Court"), an administrative agency affiliated with the California State Bar Association ("State Bar"). Calif. Bus. & Prof. Code section 6086.5... The attorney may appeal to the Review Department, which reviews the Hearing Department's findings de novo and makes its own recommendation. The attorney may then file a petition for review with the California Supreme Court. n1 Id. Section 6082. The Supreme Court either grants review and issues a final order or denies review, in which case the Bar Court's recommendation is filed as an order of the Supreme Court. Id. Section 6084; Calif. Court Rule 954. Throughout this process, the Supreme Court retains inherent jurisdiction over attorney disciplinary matters. Id. 951(g)." The publication appears in the section reserved for Court decisions and for Appellate Court decisions. The State Bar Court is not a Court, and it is not an Appellate tribunal. This deception on the consuming public is serious and warrants sanctions imposed against the State Bar for it practicing a fraud, artifice, and deceit in its publication of its advisory opinions in violation of California Business and Professions Code section 6068(d).

B. The State Bar's Publication of Its Opinions Violates the California Constitution

Pursuant to **Article 6, section 14** of the California Constitution, "The legislature shall provide for the prompt publication of such opinions of the Supreme Court and Courts of Appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person." This provision in the Judiciary section of the California Constitution follows the constitutional provision in the Judiciary Section which states that the State Bar of California is a public corporation. Article 6, section 9, California Constitution. As a public corporation within the Judicial Branch of government, the Constitution could have clearly provided that the legislature may provide for the prompt publication of the State Bar's opinions, but the Constitution does not provide for publication of State Bar opinions. The subject of publication of judicial opinions is covered by the California Constitution. It makes no provision for publication of any opinions of the State Bar of California.

Article 6, section 14 of the California Constitution indicates that it is the legislature of the State that provides the mechanism and the mode of publication of authorized opinions. This constitutional provision does not permit any entity other than the State legislature to fulfill the duty of providing for publication of opinions. The constitutional provision indicates that it is only State Court of Appeals' decisions and those of the California Supreme Court which are authorized to be published. There is no constitutional provision authorizing publication of any other opinions.

Under the doctrine of '*expressio unius est exclusio alterius,*' the State Bar's publication of its opinions violates the California Constitution. That which is expressed excludes that which is not expressed. The doctrine derives from the Common law. It is a constitutionally required method of construction of constitutional and statutory provisions such that whatever is expressed within those provisions excludes that which is not expressed. **United States v. Barnes** (1912) 222 U.S. 513, at 518. As held this year, Justice Thomas in the United States Supreme Court in authoring the opinion in **Chistensen** et al. *v.* **Harris County et al.,** (May 1, 2000) ______U.S. ______ , stated that, "We accept the proposition that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.' **Raleigh & Gaston R. Co. v. Reid,** (1872) 13 Wall. 269, 270."

The California Constitution has expressed the exclusive mode of publishing decisions issuing from those in the Judicial Branch, which includes the State Bar, and has dictated that the State legislature arranges for publication of those decisions and that those decisions are limited to those of the Courts of Appeal and of the California Supreme Court. The doctrine of '*expressio unius est exclusio alterius,*' excludes publication of the opinions of the State Bar of California and its Court. It excludes the ability of the State Bar to publish its own opinions or to arrange for their publication by dissemination to the media and by way of its own publications. Such is the result required by the application of the doctrine of '*expressio unius est exclusio alterius*." This compels the withdrawal of the publication of the advisory opinion due to its unconstitutionality under Article, section 14 of the California Constitution.

C. The California Rules of Court Prohibit Publication of the State Bar Advisory Opinion

"...[T]he rules of court, ...have the force of positive law." **Villa v. Superior Court** (1981) 124 Cal. App.3d 1063, 1065. California Rules of Court Rule 976 states that, (a) All opinions of the Supreme Court shall be published, (b) No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion: (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; (2) resolves or creates an apparent conflict in the law; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law."

California Rules of Court, Rule 976(c) (1) states that, "An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b)." Subsection (c)(2) of Rule 976 states that, "An opinion certified for publication shall not be published, and an opinion not so certified shall not be published, on an order of the Supreme Court to that effect." Subdivision (d) provides that "Unless otherwise ordered, no opinion superseded by a grant of review, rehearing, or other action shall be published."

California Rules of Court, Rule 977 (a) states that, "An opinion that is not ordered published shall not be cited or relied on by a court or party in any other action or proceeding...." As held in **People v. Cruz** (Fourth District, Div. One 1985) 165 Cal. App.3d 648, Justice Lewis, in dissent, stated that, "Rule 977(a) of the California Rules of Court forbids both citing and relying on unpublished opinions."

It appears that the knowing use of such a citation is a violation of the Rules of Professional Conduct for attorneys. (See Rules Prof. Conduct, Rule 7-105). It would also appear that such citation of an unpublishable opinion is an act of judicial misconduct. Canon 2 of the California Judicial Code of Conduct applicable to State Bar judges states that, "A judge shall respect and comply with the law." The Comment to the Canon indicates "law" includes "decisional law." As held in **Fletcher v. Commission on Judicial Performance** (1998) 19 Cal.4th 865, a judge commits prejudicial misconduct warranting censure or removal from office when "he made no effort to comply with or follow the law." Judge Fletcher was removed from office.

In granting a demurrer to a complaint which alleged that it was unconstitutional to refuse to allow the publication of all Court of Appeals' decisions, the Court in **Schmier v. Supreme Court** (First Dist., Div. Five 2000) 78 Cal. App.4th 703 decided on Feb. 28, 2000, set forth why the Constitution and the law required restriction of publication to only those constitutional court decisions ordered to be published by the California Supreme Court. **Schmier** also sets forth why publication of decisions or opinions which do not meet the constitutional and court rule criteria would be unlawful, as follows, at 709:

> The Judicial Council of California is constitutionally empowered to adopt rules for court administration, practice and procedure, providing they are not inconsistent with statute. (Cal. Const., art. VI, § 6). The consistency of a rule is tested against the statutory scheme the rule was intended to implement. (See **People v. Hall** (1994) 8 Cal.4th 950, 959-960.)
>
> California Rules of Court Rule 976 states that, (a) All opinions of the Supreme Court shall be published, (b) No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion: (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published

opinions, or modifies, or criticizes with reasons given, an existing rule; (2) resolves or creates an apparent conflict in the law; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law." Rule 976(c) (1) states that, " An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b). Subsection (c)(2) states that, "An opinion certified for publication shall not be published, and an opinion not so certified shall not be published, on an order of the Supreme Court to that effect. Subdivision (d) provides that "Unless otherwise ordered, no opinion superseded by a grant of review, rehearing, or other action shall be published." California Rules of Court, Rule 977 (a)Rule 977 (a) states that, "An opinion that is not ordered published shall not be cited or relied on by a court or party in any other action or proceeding....

The California Constitution, article VI, section 14 requires the Legislature to provide for the prompt publication of such opinions of the Courts of Appeal "as the Supreme Court deems appropriate." Government Code section 68902 states: "Such opinions . . . of the courts of appeal . . . as the Supreme Court may deem expedient shall be published in the official reports [which] shall be published under the general supervision of the Supreme Court." The broad constitutional and legislative authority granting the

> Supreme Court selective publication discretion manifests a policy that California's highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law, giving due consideration to such factors as (a) "the expense, unfairness to many litigants, and chaos in precedent research," if all Court of Appeal opinions were published, and (b) whether unpublished opinions would have the same precedential value as published opinions. (**People v. Valenzuela** (1978) 86 Cal. App.3d 427 , 441 (dis. opn. of Jefferson, J.) [addressing issue not addressed in maj. opn.].) By providing the mechanism for realizing this policy, [78 Cal. App.4th 709] the rules are consistent with the statutory scheme they were intended to implement...
>
> **By specifically empowering the Supreme Court to determine which opinions of the Court of Appeal are appropriate for publication, the Legislature and the electorate have clearly disclosed an intent that the decisional law of this state does not require publication of every opinion of the intermediate appellate courts. Rather, the Supreme Court appropriately determines by selective publication the evolution and scope of this state's decisional law.... (emphasis added)**

Therefore, the Supreme Court-California's highest court-is the appropriate body to establish policy for determining those Court of Appeal opinions entitled to the precedential value of the *stare decisis* doctrine."

As held in **People v. Cruz** (Fourth District, Div. One 1985) 165 Cal. App.3d 648, at 654, Lewis, J., dissent, "Former Chief Justice Donald R. Wright has been quoted as saying, '[W]ith few exceptions, the only opinions which are ordered to be nonpublished are those in which the correct result has been reached by the court of appeal but the opinion contains language which is an erroneous statement of the law and if left on the books would not only disturb the pattern of the law but would be likely to mislead judges, attorneys and other interested individuals.'" (Note (1977) 50 So. Cal. L. Rev. 1181, 1185, fn. 20.)

This Court explained why it did not order the publication of all Court of Appeals' decisions in **Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.**, 43 Cal.3d 696, as follows:

"Federal procedure provides for similar limited review by the United States Supreme Court of decisions of the federal courts of appeals. No federal rule provides for "depublication" of a court of appeals' decision once the Supreme Court grants certiorari or notes appellate jurisdiction. The lower court opinion thus remains available as citable precedent on issues not reached by the Supreme Court. By contrast, a grant of review by this court determines that the Court of Appeal's opinion shall not be published unless we order otherwise. (Cal. Rules of Court, rule 976(d).

> If, before ordering post review publication, we were required to formally decide the correctness of the Court of Appeal's opinion on issues beyond the scope of our grant of review, our authority to order publication of the lower court opinion would be pointless, since the relevant analysis and precedent would then appear in our opinion, as under the old procedure. The efficient use of our new 'review' jurisdiction suggests that, as in the federal system, significant Court of Appeal opinions should be available as citable precedent with respect to

issues not reached by us on subsequent review. We deem the lower court's opinion here to be beneficial and worthy of publication in that regard, but our order for publication does not necessarily imply agreement with the Court of Appeal's analysis on issues not addressed in our opinion."

The Constitutional provision, the statute, and the Rule of Court "protect against selective prospectivity by providing a uniform and reasonable procedure to assure that actual changes to existing precedential decisions are applicable to all litigants. They require that all opinions of the state's highest court be published. (Rule 976(a).) They establish comprehensive standards for determining publication of Court of Appeal cases, particularly specifying that an opinion announcing a new rule of law or modifying an existing rule be published. (Rule 976(b).) They permit any member of the public to request the Court of Appeal to publish an opinion and, if the request is denied, require the Supreme Court to rule thereon. (Rule 978.) In short, the rules assure that all citizens have access to legal precedent, while recognizing the litigation fact of life ...that most opinions do not change the law. If appellant's view prevailed, the Supreme Court would be unable to decertify opinions for publication, which would seriously compromise its ability to control the direction of appellate precedent." **Schmeir**, at 711.

The State Bar, while serving an important function, serves in an advisory role. Its function is to aid and assist and not determine or change the law as that is set forth in the decisions of the United States and California Supreme Court. Those roles are reserved for the respective Supreme Courts. The publication of the advisory opinion in this case is unlawful. It causes ridicule and disrespect to be inflicted on this Court and the legal profession by creating new law authored and created by a non-lawyer.

D. The Right to Privacy is Violated by a Publication of an Advisory Opinion which is Uncitable Under the Law

Section 6094.5 entitled, "Goals and Policy of Disciplinary Agency," states that "A notice to show cause is a public record when filed, and b) it shall respond to inquiries as to the status of pending disciplinary cases in which a notice to show cause has been filed."

While attorney disciplinary proceedings are open to the public, the Rules and Regulations of the State Bar of California, which are contained in the California Rules of Court, state in Article XV, entitled, "Information Concerning Disciplinary Proceedings, Discipline Imposed, and Criminal Matters," states under section 1 that the State Bar shall respond within a reasonable time to inquiries as to the status of pending disciplinary cases in which a notice to show cause has been filed, or disclosure to the public is otherwise provided by law, as to public discipline that has been imposed upon an attorney in California... or as those criminal cases ... involving an attorney." There is no publication of an advisory opinion permitted by law. While a member of the Public may come to the State Bar and read it, the State Bar may not publish it as it is constitutionally, statutorily, and by rule of court prohibited from publishing it.

Article I, section 1 of the California Constitution establishes a broad constitutional right to privacy of citizens of the State of California. It is entitled, "Inalienable rights." It states the following:

> "All people are by their nature free and independent and have inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

The state constitutional right to privacy is "not only self-executing, the state right is broader than the federal constitutional right." **People v. Wiener** (1994, 4th Dist.) 29 Cal. App. 4th 1300, 35 Cal. Rptr. 2d. 321. The constitutional right to privacy is "aimed at the mischiefs of ... the improper use of information properly obtained for a specific purpose..." **Mullaney v. Woods** (1979) 97 CA 3rd. 710, 158 Cal. Rptr. 902. As held in **Westbrook v. County of** (1994, 2nd Dist.) 27 Cal. App. 4th 157, 32 Cal. Rptr. 2d. 382, "The public's right to information of record is not absolute. Where that right conflicts with the right to privacy, the justification supporting the requested disclosure must be balanced against the risk of harm posed by disclosure." The constitutional right to privacy applies to both governmental and private snooping. **Hill v. National Collegiate Athletic Ass'n** (1994) 7 Cal. 4th 1, 26 Cal. Rptr. 2d. 834, 865 P. 2d. 633. "Although the right to privacy, (Cal. Const. Art. 1, section 1) is not absolute, it may be abridged only when there is a compelling and opposing state interest. ...[W]hen compelled disclosure of private affairs intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information.... [T]here must be...a careful balancing of compelling public need for disc[losure] against the fundamental right to privacy.." **Garstaang v. Superior Court** (1995, 2nd Dist.) 39 Cal. App. 4th 526, 46 Cal. Rptr. 84.

As in **Wood v. Superior Court** (1985) 212 Cal. Rptr. 811 involving the quashing of investigation subpoenas issued by the Board of Medical Quality Assurance for the files of a physician, the impairment of the constitutional right to privacy may not be justified by a claim that the regulatory board has jurisdiction to investigate a physician whom it licenses and over which it has disciplinary authority.

In **United States Department of Justice v. Reporter's Committee** (1989) 466 U.S. 235, the United States Supreme Court denied disclosure to reporters of rap sheets compiled by the Department of Justice on the grounds of the privacy rights of the accuseds even though the information was a matter of public record at various police departments, courts, agencies, and tribunals. It stated that, "To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. .... [T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." The United States Supreme Court explained why privacy rights compelled denial of publication of the summary even though it contained information any member of the Public could obtain at the courthouse, at footnote 14: "In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time.... rendered it private." At footnote n15, the Court stated that, "Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole....The common law recognized that one did not necessarily forfeit a privacy interest in matters made part of the public record, albeit the privacy interest was diminished...See **Cox Broadcasting Corp. v. Cohn,** 420 U.S., at 494-495 ... W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser & Keeton on Law of Torts at 117, p. 859 (5th ed. 1984) ('[M]erely because [a fact] can be found in a public recor[d] does not mean that it should receive widespread publicity if it does not involve a matter of public concern)."

As stated by Chief Justice Rehnquist in his law review article on the subject, "[T]he fact that "an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." Rehnquist, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, p. 13 (Sept. 26-27.)

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process guarantees must scrupulously be observed. **Wisconsin v. Constantineau,** (1971) 400 U.S. 433, 437. See also **Board of Regents v. Roth**, (1972) 408 U.S. 564, 573 (same with respect to "any charge . . . that might seriously damage [a person's] standing and associations in his community"); **Paul v. Davis** (1976), 424 U.S. 693, 722-723 (BRENNAN, J., dissenting) ('[The] enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty").

In **Owens v. City of Independence** 445 U.S. 622, 633; 100 S. Ct. 1398, 63 L. Ed. 2d 673, the United States Supreme Court set forth why a City and its employees issuing press releases leveling charges which impugned a person's character and affected his employment are liable for violating the person's civil rights under color of state law, as follows:

> "In **Board of Regents v. Roth**, (1972) 408 U.S. 564, 573, we explained that the dismissal of a government employee accompanied by a 'charge against him that might seriously damage his standing and associations in his community" would qualify as something 'the government is doing to him,' so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city -- through the unanimous resolution of the City Council -- released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact 'cause' petitioner's discharge, the defamatory and stigmatizing charges certainly "[occurred] in the course of the termination of employment." Cf. **Paul v. Davis**, 424 U.S. 693, 710 (1976). Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of

Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law."

The motion to withdraw publication of the advisory opinion which is attached hereto as Exhibit D and the Reply to Response to Respondent's Motion for Withdrawal of Publication which is attached hereto as Exhibit K indicate the publication was unlawful. This requires that an order issue withdrawing the publication of the Opinion and that the same be publicized as withdrawn in the same legal newspapers to which the State Bar sends its opinions as press releases and in The California Lawyer. This Court should now order the State Bar of California to cease and desist from releasing to any news media any of its opinions.

E. Publication by the State Bar of An Advisory Opinion Denies The Attorney the Equal Protection of State Law

It would deny to the attorney the equal protection of State Law and the due process of law to decline to follow the law prohibiting publication of an advisory opinion of the State Bar Court of the State Bar of California. As held in **Connolly v. Union Sewer Pipe Co.**184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431, no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, and property, and in pursuit of happiness. All other persons in the State may not be subject to publication of an advisory opinion[7] in newspapers State-wide claiming the issuer is a Court of law when it is not a constitutional court of law but a public corporation and which impugns the person's character, reputation, skill, competence, career, licensing, and income while it has no binding force and effect as a decision of a court of law. The Constitution prevents that. For the State Bar and its Court to claim that it has carved out an exception for itself from the mandates of the California Constitution, the statute, and the Rule of Court prohibiting such publication by passing its own rule of procedure for itself which permits it to publish its advisory opinions is to admit to denying to this attorney the required equal protection of the law in violation of the fourteenth amendment to the United States Constitution. The Fourteenth Amendment states that, ""No state shall deny to any person within its jurisdiction the equal protection of the laws." **Fuentes v. Shevin** (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; **Mullane v. Central Hanover Tr. Co.** (1950) 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865; **Endler v. Schutzbank** (1968) 68 Cal. 2d 162, 65 Cal. Rptr. 297, 436 P.2d 297; **Bell v. Burson**, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 S.Ct. 1011, 25 L.Ed. 2d 287; **Kelly**, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287.

---

[7] State Bar Rule of Procedure Rule 310(a) states, "All opinions of the Review Department which are designated for publication by the [State Bar] Court [of the State Bar of California] shall be published in

"Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." **Sweatt v. Painter**, (1950) 339 U.S. 629, 635 (quoting **Shelley v. Kraemer** (1948) 334 U.S. 1, 22. "The threshold prerequisite to an equal protection claim, however, is unequal treatment of persons who are similarly situated."

---

the California State Bar Court Reporter or other publications as directed by the Board of Governors [of the State Bar].

(**People v. Jerex** (1989) 208 Cal. App. 3d. 132, 138-139). "The guaranty of equal protection of the laws is a pledge of the protection of equal laws." **Skinner v. Oklahoma** ex. rel. Williamson, (1942) 316 U.S. 535, 541 (quoting **Yick Wo v. Hopkins**, (1886) 118 U.S. 356, 369. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." **Department of Agriculture v. Moreno**, (1973) 413 U.S. 528, 534. "A law must bear a rational relationship to a legitimate governmental purpose." **Kadrmas v. Dickinson Public Schools**, (1988) 487 U.S. 450, 462,"The Equal Protection clause imposes a requirement of some rationality in the nature of the class singled out." **James v. Strange** (1972) 407 U.S. 128, 140, quoting **Rinaldi** 384 U.S., at 308-309 and that rationality is absent here..... giving preference to a discrete class merely to accomplish the elimination of [rights to that class], is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. **Reed v. Reed** (1971) 404 U.S. 71, 76 **Logan v. Zimmerman Brush Co.** 445 U.S. 442, at 442 (J. Blackmun concurring).

The publication of the advisory opinion was unconstitutional as it invidiously discriminates against this attorney as a member of the class of compelled members of the State Bar who are the only class of persons in the State who are subject to the unlawful publication of an advisory opinion impugning the reputation, income, careers, clientele, and character of the professional in derogation of the mandates of the equal protection of the law.

F. The Pre-Trial Publication by the State Bar Judges of Their Advisory Opinion is Judicial Misconduct

The advisory opinion reverses and remands for a new trial while summarily and without notice, hearing, or opportunity for trial or a fair hearing on appeal, finding culpability of a charge never made while the record reflects the tribunal is required to enter an order of exoneration of the attorney of the moral turpitude and business transaction charges. The Advisory Opinion asserts that the judges' reading of a punitive damage instruction and verdict is enough, without a trial or right to be heard, to conclusively establish culpability of an act of moral turpitude. The fact there is admittedly no law nor facts in support of such claims compounds the unfairness of the procedure.

It is judicial misconduct for a judge to disseminate to the media judicial comments about a case, especially when it is still pending a trial and a final adjudication. The Advisory Opinion in the middle of this proceeding not only prejudges the merits but makes a conclusion that admittedly has no facts to support it and inflames, impugns, and defames an attorney without a trial or a fair opportunity at any point to have notice of the change in the charges and to be heard concerning it. It prejudices the rights of the attorney on remand to a fair trial and a fair procedure. In **Ryan v. Commission on Judicial Performance** 45 Cal. 3d 518; 754 P.2d 724; 247 Cal. Rptr. 378; 76 A.L.R.4th 951, this Court held that a judge was required to be removed from office for numerous acts of judicial misconduct involving both willful misconduct in office and prejudicial conduct. This Court stated that, "Censure or removal from office is appropriate when a judge engages in wilful misconduct or prejudicial conduct. (Cal. Const., Art. VI, Section 18, subd. (c).) The charge of willful misconduct refers to 'unjudicial conduct which a judge acting in his judicial capacity commits in bad faith.' (**Geiler, supra**, 10 Cal.3d. at p. 284.) The lesser charge of prejudicial conduct comprises conduct which the judge undertakes in good faith but which would nonetheless appear to an objective observer to be unjudicial and harmful to the public esteem of the judiciary. It also refers to unjudicial conduct committed in bad faith by a judge not acting in an official capacity. (**Furey v. Commission on Judicial Performance** (1987) 43 Cal.3d 1297, 1304-1305 [240 Cal.Rptr. 859, 743 P.2d 919]; **Gonzalez, supra**, 33 Cal.3d at p. 365; **Geiler, supra**, 10 Cal.3d at p. 284 and fn. 11)."When a judge is acting in an official capacity, the critical distinction between wilful misconduct and prejudicial conduct is the presence of bad faith or malice. (**Furey, supra,** 43 Cal.3d at p. 1304.)."

Among the grounds for removal of the judge from office was the following, "The sentence was unusually severe for such a conviction. Wiggins's attorney asked the judge to state his reasons for the sentence on the record. Judge Ryan refused. The next day the judge made comments to the press which appeared on the front page of the local newspaper. Judge Ryan told the press that the Wiggins sentence was intended to discourage costly and time-consuming jury trials and that 'there had to be some incentive not to go to trial." In finding this conduct to warrant the sanction imposed, the Court said, at page, 546, that "The judge's conduct exhibits a pattern of personal embroilment in the cases assigned to him. He has lost his temperance and objectivity on several occasions, resulting in prejudice to the parties appearing before him or in abuse of his contempt power. He has attempted to defend his position in the courts and in the media with little regard for procedure or judicial decorum. 'The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield.' (**Furey, supra**, 43 Cal.3d at p. 1320.) That purpose will best be served by adopting the recommendation of the Commission that Judge Ryan be removed from office." He was.

Publication of this advisory opinion which remands for a new trial, when the State Bar and its Court are advisory only and this case is in the preliminary stages, offends the precepts of law prohibiting pre-adjudication publications which prejudge the merits, in addition to being a violation of the Constitutions of the State and of the United States. **Sheppard v. Maxwell**, 384 U.S. 333, 86 S.Ct. 1507.

As the United States Supreme Court held in **Keller v. State Bar of California,** ""The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. **Keller v. State Bar of California,** (1990) 496 U.S. 1, 110 S. Ct. 2228, 110 L.Ed 2d. 1 at 13. The State Bar of California was permitted to exist in 1927 based on seven conditions to its constitutionality. **In re Cate** 270 P. 969 (1928) and 273 P. 617 (1928). It could exist only so as long as it was a "self governing" bar association, **Hogan v. State Bar** (1944) 36 Cal. 2d. 809, 811, 228 P. 2d. 554; "an institution controlled and managed by the members of the profession acting...without compensation and functioning as an arm of" the California Supreme Court in the matter of admissions, reinstatements, and discipline of attorneys, **Herron v. State Bar** (1951) 212 Cal. 196, 199, 298 P. 474, 475; it was advisory only, **Brotsky v. State Bar** (1962) 386

P. 2d. 697, at 704; and it possessed no court name or judicial power, since "The legislature cannot confer on the state bar judicial authority..." **In Re Cate** (1928) 273 P. 617, **Johnson v. State Bar** (1935) 52 P. 2d. 928, 4 C. 2d. 744, **Fish v. State Bar of California** 4 P.2d.937, 214 C.215, **Chronicle Publishing Co. v. Superior Court** (1939) 7 Cal. Rptr. 109, 354 P. 2d. 637, 54 C.2d. 548.

The publication of opinions is controlled by Article 6, section 14 of the California Constitution which permits the legislature to publish opinions of the State Courts of Appeal and of the California Supreme Court. There is no provision authorizing publication of any State Bar opinions and the legislature has never authorized the State Bar of California to publish any of its opinions. Its constitutional status is as a corporation. They do not have opinions that are publishable as opinions.

The State Bar Rule of Procedure purporting to authorize the publication of the State Bar's Court opinions is also supplanted by the express mandate of California Rules of Court, Rules 976 and 977. "...[T]he rules of court, ...have the force of positive law." **Villa v. Superior Court** (1981) 124 Cal. App.3d 1063, 1065. The State Bar's Rules of Procedure have no force of law. They are superseded by that which is the law. California Rules of Court Rule 976 states that, (a) All opinions of the Supreme Court shall be published, (b) No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion: (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; (2) resolves or creates an apparent conflict in the law; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law." California Rule of Court 976 follows the mandate of Article 6, section 14 of the California Constitution and permits publication of only Supreme Court and some Court of Appeals' decisions. Only if the Court of Appeals' decisions fulfill specified and required criteria are they permitted to be published. The clear and express mandate is that only California Supreme Court and some Court of Appeals decisions are permitted to be published in the State.

The fact that state law prohibits any judge, attorney, or party ever citing or relying on any State Bar opinion as set forth in California Rules of Court, Rule 977 indicates that the sole purpose of the publication of the opinions by the State Bar is for it to attempt to aggrandize its power, confuse the Public into believing it has a legitimate court and judges and makes decisions, and to defame an attorney before there can ever be a final decision so that the attorney is ruined mid-way in the process and before there is any judicial and final adjudication by the California Supreme Court. Such are not permissible purposes to justify the violation of the California Constitution and the Rules of Court of the State of California by the State Bar of California. Such indicates the clear intent of the State Bar of California to violate intentionally the civil rights of accused attorneys under the color of state law and for no permissible disciplinary purpose as an administrative arm to the California Supreme Court. Such publication is also clearly outside the scope of any disciplinary purpose and is ultra vires the authority of the State Bar of California. No state constitution provision, no rule of court, no state statute authorizes any such publication by the State Bar of California, and the provisions that are set forth indicate such publication is clearly forbidden to it.

Since the publication is unconstitutional and unlawful, it is required to be withdrawn.

G. The Right to a Fair Trial is Violated by the Publication of Culpability Findings Before the Trial

The Opinion finds culpability of an act of moral turpitude then reverses and remands for the trial to find the facts. Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." **Taylor v. Kentucky**, (1978) 436 U.S. 478, 485. The United States Supreme Court in **Patterson v. Colorado** (1907) 205 U.S. 454, 462 set forth the abiding principle as follows:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

The publication of such a finding of culpability before the trial prejudices and prejudges the merits and determines the outcome before the trial. The law is clear in that not only is no such procedure countenanced in the law, but the publication intends to deny to the accused his rights to a fair trial. As stated by the United States Supreme Court, "Our system of law has always endeavored to prevent even the probability of unfairness." **In re Murchison**, (1955) 349 U.S. 133, 136, 625 (emphasis added); see also **Sheppard v. Maxwell,** (1966) 384 U.S. 333, 352 ; **Estes v. Texas**, (1965) 381 U.S. 532, 544. The United States Supreme Court has insisted that an accused be tried by "a public tribunal free of prejudice, passion, excitement, and tyrannical power." **Chambers v. Florida**, (1940) 309 U.S. 227, 236-237, 476-477. The United States Supreme Court has frequently invoked the opinion of Chief Justice Taft fifty years ago, which held that "[e]very procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." **Tumey v. Ohio**, (1927) 273 U.S. 510, 532 , 444, cited in **Irvin v. Dowd, supra**, 366 U.S. at 722, 81 S.Ct. at 1642; **Estes v. Texas, supra,** 381 U.S. at 543, 85 S.Ct. at 1633. The publication and the publicity surrounding the State Bar's state wide dissemination of its advisory opinion finding culpability of an act of moral turpitude while admitting it has no facts and remanding to find the facts to support its foregone conclusion prejudices the proceeding. This procedure involves such a probability that prejudice will result that it is deemed inherently lacking in due process' ") (quoting **Estes v. Texas**, (1965) 381 U.S. 532, 542-543, 1632-1633. The underlying constitutional question is whether the atmosphere of the community had been so saturated by adverse publicity as to deprive the trial of the constitutional requirement of due process. **Sheppard v. Maxwell**, 384 U.S. 333. The State Bar invidiously discriminated against this accused by first denying him a trial, then admitting that it denied him his due process rights to a trial, but finding culpability anyway by inventing a new unnoticed charge, then remanding for a new trial to find the facts to support the culpability finding, while publishing throughout the State of California that it had already found the attorney guilty even though it had no facts to support the finding. It has no criteria for such publication. It does not publish every opinion it issues. When a State makes available a means for review, it is held to a "constitutional requirement of substantial equality and fair process." **Anders v. California,** 386 U.S. 738, 744. It may not discriminate arbitrarily between persons. **Burns v. Ohio** 360 U.S. 252. It must adhere to the requirements of due process. **Swenson v. Bosler** 386 U.S. 258, 260.

As held in **Groppi v. Wisconsin** (1971) 400 U.S. 505 and **Irvin v. Dowd** 366 U.S. 717 the requirements of a fair trial guarantees to the accused an impartial and indifferent adjudicator. "The failure to accord an accused a fair hearing violates even the minimal standards of due process. **In re Oliver**, 333 U.S. 257; **Tumey v. Ohio**, 273 U.S. 510. `A fair trial in a fair tribunal is a basic requirement of due process.' **In re Murchison**, 349 U.S. 133, 136. An adjudicator must be as `indifferent as he stands unsworne.' Lord Coke, Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. **Thompson v. City of Louisville** 362 U.S. 199. As held by the United States Supreme Court, "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." **Bridges v. California** (1941) 314 U.S. 252, 271, 197 at 271. No court of law sends it opinions to the newspapers and tells them to publish it as does the State Bar. Such irrational, discriminatory, invidious, and unfair practices by the State Bar, when it is not a Court, intends to deny to the targeted accused his rights to a fair trial and a fair procedure. As held in **Murphy v. Florida** (1975) 421 U.S. 794, at 798, "Prejudice was presumed in the circumstances under which the trials in **Rideau v. Louisiana** 373 U.S. 723, 726, **Estes**, and **Sheppard** were held. In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings."

Since the publication of the opinion prejudices the attorney's rights to a fair trial and a fair and indiscriminate procedure, it should now be withdrawn and the State Bar ordered to cease and desist having its opinions published in newspapers or law journals. In addition, it denies to the attorney his due process and equal protection rights under the fourteenth amendment to a "meaningful opportunity to be heard in a meaningful manner" as required under **Armstrong v. Manzo** (1965) 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d. 62. The fact there is no criteria operating as a restraint on the excesses of media publication of advisory opinions of the State Bar in its Rule of Procedure Rule 310, unlike the corresponding protections provided concerning publication of Court of Appeals' decisions, indicates that a standard less defamatory sweep without logic or reason or any police power purpose is sanctioned by such publication in derogation of the due process clause. **In re: Ruffalo** (1968) 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed. 2d. 117, **Schware v. Board of Examiners** (1957) 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d. 796, and **Spevack v. Klein**, 385 U.S. 511, 515.

VII

Conclusion

Attorney disciplinary proceedings are quasi-criminal. **Spevack v. Klein** (1967) 385 U.S. 511, 37 S. Ct. 625, 17 L. Ed. 2nd 574. Basic protections of the due process clause require some semblance of a fair trial and procedure. In this case there was none. The hearing judge barred a trial to the accused. He found culpability by misapplying collateral estoppel. The Review Department admits that the constitutional rights of the accused were violated by the misapplication of collateral estoppel. It then compounds the abuses by changing the moral turpitude charge from that which was noticed and finding culpability of a brand new unnoticed charge while admitting it has no facts, no law, and no evidence to support such a finding. The Review Department then misapplies collateral estoppel in an even more serious manner by claiming damages in a civil suit is merits in a quasi-criminal case, that commonality and not identical issue is all that is required to bar a trial for an accused, that civil punishment damages are the same purpose as attorney disciplinary proceedings, that a civil burden of proof is the same as the attorney disciplinary burden of proof which requires that all intendments be made in favor of the accused attorney; and that it can just make up a brand new charge after trial and conclusively find guilt of it with no notice, no trial, no law, and no evidence while refusing to exonerate the attorney of the charges it admits that the prosecutor failed to prove.

While the Review Department admits that the prosecutor failed to prove his case on the moral turpitude and business transaction charges that were filed, it provides the prosecutor a second shot by automatically finding guilt of a new moral turpitude charge and then remanding for the ostensible purpose of finding the facts to support the conclusion of culpability already made. It refuses to issue the required exoneration of the attorney of the moral turpitude and business transaction charges as required by law and subjects the accused to another trial when his innocence of the charges made is already proven in the Review Department opinion. To compound the lack of fairness, the Review Department publishes its advisory opinion as a Court of law decision state-wide in violation of the United States Constitution, the California Constitution, statute, and the California Rules of Court.

The State Bar must now be ordered to cease its unlawful publication of its opinions and the opinion at issue must be publicly withdrawn. Steps of close oversight and auditing must be taken to reign in the conduct of the State Bar and its Court denying accuseds their rights to a trial, to defend, to confront accusers, to cross-examine witnesses, to have notice in advance of trial of the charges, to have findings made consonant with some law, to have an adjudicator with some expertise and experience in the law, and to have innocence found when the law requires the same.

Since the only finding of culpability that can stand is that of failing to report the civil judgment under California Business and Professions Code section 6068(o)(2), and the attorney has an unblemished record for thirty four years, this Court should exercise its plenary authority over attorney disciplinary matters and issue a reproval for that violation and dismiss with prejudice the moral turpitude and business transaction charges for insufficiency of the evidence, so that this proceeding which has cost the attorney over $100,000.00 thus far to defend against some of the worst abuses ever inflicted on an accused is finally finished . Due process of law requires no less.

In default thereof, the Petitioner requests this Court certify the six questions for determination by the United States Supreme Court so that appropriate constitutional action may now be taken.

RESPECTFULLY SUBMITTED,

Dated: December 28, 2000

B. Bruce Kittrell, Esq.

Verification

I declare under penalty of perjury the above Petition is based on my own personal knowledge, information, and belief, and this verification is executed this 28th day of December, 2000 at Torrance, California.

B. Bruce Kittrell
Petitioner Attorney ***Pro Se***

B. BRUCE KITTRELL
A Professional Corporation
Suite 201
Airport Office Plaza
25200 Crenshaw Boulevard
Torrance, CA 90505

(310) 891-1190

Respondent Attorney ***Pro Se***

THE STATE BAR COURT

OF THE STATE BAR OF CALIFORNIA

REVIEW DEPARTMENT - LOS ANGELES

In the Matter of) Case No.95-0-14321
)
)
BOLDEN B. KITTRELL) **POINTS AND AUTHOR-**
) **ITIES IN SUPPORT OF**
) **MOTION FOR**
) **RECONSIDERATION**
) **OF OPINION ON**
) **REVIEW**
No. 40896) State Bar Rule of
A Member of the State Bar) Procedure, Rule 309
) California Rule of Civil
) Procedure 1008, Fifth and
) Fourteenth Amendment,
) United States Constitution
)
)

I.
Introduction

The respondent attorney is an attorney for thirty four years. His performance as an attorney at law is impeccable as is his reputation as an attorney at law for thirty four years. He has no prior complaints and no disciplinary record.

This Points and Authorities addresses the accompanying motion for reconsideration of the Opinion on Review filed on October 26, 2000 and is based on the "new or different facts, or circumstances or law" which require a decision exonerating the attorney of the act of moral turpitude and business transaction charges. California Code of Civil Procedure section 1008, State Bar Rules of Procedure, Rule 309, Fifth and Fourteenth Amendments to the United States Constitution.

The Opinion on Review asserts that it finds culpability of an act of moral turpitude while admitting it has no facts to support said conclusion. Because the Opinion on Review admits there are not sufficient facts to conclude that an act of moral turpitude can be found based on the noticed charge and admits there are no facts to support a finding of a business transaction violation, the Opinion admits that it is required to enter an exoneration of the attorney on those charges.

The Opinion's finding of an act of moral turpitude is based on its refusal to permit the accused to have a trial, to confront and cross-examine his accusers, or to defend himself. The findings are also a fatal variance from the noticed charges requiring that the Opinion on Review concerning an act of moral turpitude be excised and the accused be held to have been exonerated of the moral turpitude charge as a matter of law. The Opinion conclusively establishes that the attorney is entitled to an Opinion exonerating him of the act of moral turpitude and business transaction charges.

The findings deny fundamental due process of law and the equal protection of the law and violate the Supremacy Clause of the United States Constitution requiring that the adjudicators follow the decisions of the United States Supreme Court on United States constitutional law concerning the due process and equal protection rights of an accused in a quasi-criminal attorney disciplinary proceeding.

"Section[s]" refers to sections of the California Business and Professions Code. "Rule[s]," refers to the California Rules of Court. "Opinion" or "Opn." refers to the October 26, 2000 Opinion on Review.

Because the Opinion does not appear on legal pleading paper with numbers to the left of the pages, the citation methodology used herein is to cite first to the page upon which the statement or proposition appears, then to the paragraph number on that page, and then to the line on that page. The latter reference to the line means the line from the beginning of the page, rather than the line from the beginning of the paragraph.

Although the civil suit merits were tried on a preponderance of the evidence standard of proof and involved completely different issues from the ones involved in this disciplinary proceeding, the attorney was barred from defending himself in this proceeding. AOB: 9:22-26, 10-12:1.

The Opinion on Review finds culpability based on finding a conclusion while admitting it has no facts to support said conclusion and when there was no trial. It also changes the noticed charge of an act of moral turpitude contained in the Notice of Disciplinary Charges so that the entirety of the Opinion on that issue is based on new claims, no law, and an unnoticed charge. The Opinion on Review claims it may recognize a punitive damage instruction and verdict concerning fraud or breach of fiduciary duty and malice, oppression, or fraud in the damage award and states that this punitive damage award conclusively establishes an act of moral turpitude while none of the civil proceeding nor instructions nor verdict mention the words "moral turpitude," nor does the term have any finite meaning sufficient to provide fair notice that such a damage claim in a civil lawsuit or malice or oppression damages would possibly be incorporated into such term.

The Opinion violates the Supremacy Clause of the United States Constitution which prohibits such new claims. The Opinion seeks to change the law when the body issuing the opinion admittedly has no case law authority for its opinion and when its Opinion would expand moral turpitude to a million other situations never intended to be covered by the term, thereby enhancing and augmenting its acknowledged vagueness and over breadth which has caused it to be disallowed by the American Bar Association as an inherently vague and ambiguous term incapable of enforcement and which infringes on an attorney's freedom of speech.

The following new errors of law and of fact need to be addressed by way of reconsideration and application of the correct law and facts to the Opinion:

1. It is an error of law to change the charges from those alleged in the Notice of Disciplinary Charges and to invent *ex parte* and *sua sponte* new unnoticed ones.

2. It is an error of law to refuse to enter an order exonerating the attorney of the moral turpitude and business transaction charges when the Opinion admits that the prosecutor failed to prove by clear and convincing evidence and with all intendments in favor of the accused attorney culpability of those charges.
3. It is an error of law to conclusively find an act of moral turpitude without a trial and in vindictive retaliation against the attorney for his presenting the constitutional issues concerning the financial interest of the adjudicators in the outcome and the unconstitutionality of the procedures, processes, courts, and judgeships of the privately financed and run State Bar Court of the State Bar of California.
4. It is an error of law to conclusively find an act of moral turpitude for the first time and with no precedent for such a claim as applied to a punitive damage award in a civil lawsuit and to apply this new claimed legal doctrine without any advance notice to this accused.
5. It is an error of law to expand the meaning of the term, “an act of moral turpitude” beyond the limiting definition ordered by the United States Supreme Court requiring that the term be applied to solely cases involving fraud and a specific intent to defraud.
6. It is an error of law to assert that act of moral turpitude is not unconstitutionally vague.
7. It is an error of law to assert that the punitive damage award in a civil lawsuit clearly falls within the plain meaning of the act of moral turpitude statute.

8. It is an error of law to fail to address and to refuse to exonerate the attorney of the moral turpitude charge when it is admitted that the term is over broad.
9. It is an error of law to apply collateral estoppel to a civil proceeding in a quasi-criminal proceeding.
10. It is an error of law to apply collateral estoppel to a civil proceeding in a quasi-criminal proceeding when the purposes of the two proceedings are different.
11. It is an error of law to apply collateral estoppel to issues that were not the same.
12. It is an error of law to apply collateral estoppel to a claimed fact in a civil proceeding and assert that establishes an aggravating factor in a quasi-criminal proceeding.
13. It is an error of law to assert that collateral estoppel applies to find moral turpitude when the decision admits that the civil jury verdict does not establish that moral turpitude occurred or what it could possibly be.
14. Since the civil jury findings and the civil lawsuit never mention the words "moral turpitude," it is an error of law to conclude that something never mentioned in a civil proceeding is found in a quasi-criminal proceeding without a trial.
15. It is an error of law to claim that a damage jury instruction and not a merits jury instruction controls the merits issue in another proceeding.
16. It is an error of law to apply a damage verdict to a merits finding in another proceeding without a trial.
17. It is an error of law to assert that collateral estoppel applies to a damage verdict as a damage verdict is not a cause of action.

18. It is an error of law to claim that issues concerning damages relative to malice establish the merits of another proceeding.
19. It is an error of law to claim that issues concerning damages relative to oppression establish the merits of another proceeding.
20. It is an error of law to assert that a civil damage finding based on an instruction on clear and convincing evidence applies to a quasi-criminal merit finding that requires as a burden of proof that "all intendments in favor of an accused attorney's innocence be made."
21. It is an error of law to make a finding based on a subjective and not an objective criteria.
22. It is an error of law to assert that malice as defined in a civil jury suit concerning punitive damages is moral turpitude.
23. It is an error of law to assert that oppression as defined in a civil jury suit concerning punitive damages is moral turpitude.
24. It is an error of law to assert that an act of moral turpitude applies to conduct concerning a separate business transaction unrelated to the practice of law.
25. It is an error of law to assert that a prosecutor may prove clear and convincing evidence in a quasi-criminal proceeding solely by reference to a civil lawsuit record when the civil lawsuit is tried on a lower standard of proof and the judge has no capacity to see, observe, or determine the credibility of a witness from a civil record and the accused is denied his fundamental right to confront and cross-examine his accusers in the quasi-criminal proceeding.

26. It is an error of law to assert that a hearing judge may determine credibility of a witness based on reading a transcript from another proceeding and the Opinion misstates the respondent's contention that a credibility determination may not be made from such a reading.

27. It is an error of law to claim a judge has discretion to introduce or exclude evidence as a judge must follow the law concerning the admission or exclusion of evidence.

28. It is a misstatement of the facts to assert that, "...[O]ther than making a general claim that it would be unfair to apply principles of collateral estoppel against him in this proceeding, respondent did not specifically identify any such unfairness."

29. It is an error of law to claim that the act of moral turpitude statute means any act which involves moral turpitude which defies the plain meaning rule of constitutional construction of statutes.

30. It is an error of law to cite cases involving practicing law when dealing with a lawsuit concerning a failed investment.

31. It is an error of law to assert that the duties owed by an attorney to a client are the same duties owed to the public at large concerning other business dealings.

32. It is an error of law to rely on criminal conviction cases for dicta that those principles apply to a civil lawsuit over a failed investment.

33. It is an error of law to rely on cases involving gross negligence or carelessness when there is no jury finding of any gross negligence or carelessness.

34. It is an error of law to conclude that terms from a damage instruction which have over one hundred

different meanings and which never refer to nor incorporate any concepts of moral turpitude establish the same if the jury finds a breach of any fiduciary duty by a preponderance of the evidence.

35. It is an error of law to omit the critical fact that the jury vote on the fraud issue based on preponderance of the evidence was a nine to three vote, indicating that reasonable persons even under the lower standard of proof did not believe that any fraud had occurred.

36. It is an error of law to assert that fraud is the basis of the decision when this Court knows the merits of the fraud claim were tried based on a preponderance of the evidence and the jury verdict was nine to three.

37. It is an error of law to cite and rely on cases involving the commission of crimes when there is admittedly no crime involved in this case.

38. It is an error of law to cite and rely on cases involving intentional dishonesty when there is nothing in the record indicating any such finding.

39. It is an error of law to find acts of moral turpitude when there is no such jury finding.

40. It is an error of law to assert that act of moral turpitude clearly applies to a damage instruction on malice or oppression.

41. It is an error of law to assert that act of moral turpitude is conclusively found from a claim that the damage instruction concerning breach of fiduciary duty conclusively establishes the same.

42. It is an error of law to claim that the constitutional right to confront and cross-examine one's accusers is the right to have an "opportunity to attempt to contradict, temper, or explain the evidence."

43. It is an error of law to cite constitutionally and legally precluded opinions.
44. It is an error of law to rely on constitutionally and legally precluded opinions.
45. It is an error of law to rely on legal standards of uncitable cases which are in direct contradiction to the legal standards set forth in the decisions of the United States Supreme Court on the doctrine of collateral estoppel.

II.

The Opinion Violates the Supremacy Clause of the United States Constitution

The United States Supreme Constitution states that, "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; and anything in the constitution or laws of any state to the contrary notwithstanding." Article VI, clause 2Article VI, clause 2, United States Constitution.

"[T]he Supremacy Clause requires courts to follow federal, not state law." United States Constitution., Art. VI, cl. 2; see **California Fed. Sav. & Loan Assn. v. Guerra**, 479 U.S. 272, 280 California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 280 .

A. The United States Supreme Court's Orders Concerning the Constitutional Rights of an Accused Attorney are Violated by the Opinion on Review

The Opinion on Review needs to be reconsidered to pay allegiance to the obligations imposed on the State Bar of California by the Supremacy Clause of the United States Constitution. The State Bar of California's duty is to follow the decisions of the United States Supreme Court concerning the constitutional rights of an accused in a quasi-criminal proceeding. Those rights, which are violated by the Opinion on Review, are the following:

1. The right to an order of exoneration when admittedly there is no evidence to support the noticed charge of an act of moral turpitude.
2. The right to an order of exoneration of the charge of business transaction violation when admittedly there was insufficient evidence to support the charge.
3. The right to notice of the charges in advance of the trial.
4. The right to not have an overly broad statute which chills a substantial amount of protected freedom of speech applied.
5. The right to fair notice of the conduct proscribed and required.
6. The right to a trial.
7. The right to notice of the grounds of the action taken in advance of issuance of an opinion.
8. The right to present evidence in one's defense.
9. The right to confront one's accusers.
10. The right to cross-examine one's accusers.
11. The right to findings of fact before conclusions of law are made.
12. The right to a conclusion of law that is based on facts and not on an Opinion that admits that there are no facts for a conclusion.

B. It is a Violation of Due Process to Reverse a Case and Render Judgment Absolute Upon a

Proposition of Fact Not Raised Nor Noticed in the Proceeding

The Opinion concerning a conclusive finding of an act of moral turpitude is required to be reversed and an exoneration of the attorney found on the charge of an act of moral turpitude. This exoneration of the attorney is compelled by the decision of the United States Supreme Court in **Saunders v. Shaw** 244 U.S. 317 (1917). In that case, the State Supreme Court reversed a case and rendered judgment absolute against the party who succeeded in the trial court upon a proposition of fact which was ruled to be immaterial at the trial and concerning which the party had no proper opportunity to introduce his evidence. This rendering of a decision on an issue not properly pled, raised, or tried compelled reversal of the Supreme Court decision. Likewise, the Opinion's conclusion that the attorney committed an act of moral turpitude based on facts never alleged and not found when admittedly the facts pled in support of an act of moral turpitude in the Notice of Disciplinary Charges were not supported by any evidence requires an order exonerating the attorney of the moral turpitude charge.

1. The Fatal Variance between the Noticed Charges and the Opinion's Findings Requires Exoneration of the Attorney of the Moral Turpitude Charge

A fatal variance exists between the Notice of Disciplinary Charges, hereinafter referred to as NDC or "The Notice," upon which this proceeding was based and the Opinion on Review concerning the act of moral turpitude claim. The Opinion admits there is no evidence to support the act of moral turpitude charge requiring that the attorney be exonerated of that charge as a matter of constitutional due process and equal protection of the law.

The Notice itself alleges in Count three that, "Respondent reasonably knew or should have known that the facts concerning the aforesaid investment which he was concealing from James were material to her in making the investment decision and that she needed the funds returned to her in three or four months for investment into a condominium. By concealing from James, at the time she made the aforesaid investment, the true financial state of the asset into which she was investing her funds, Respondent engaged in an act of moral turpitude as set forth in Business and Professions Code section 6106." NDC: 7: 23-27, 8:1-5. This is the only moral turpitude charge.

While the noticed charge states no cause of action of moral turpitude which is legally cognizable,[1] the Opinion admits there are no facts to support the noticed claims which requires the exoneration of the attorney as a matter of law of the moral turpitude claim. Prosecutors have one bite at the apple. The Opinion offering them two bites denies basic due process of law. The State Bar can not change its charges *ad hoc, ex parte*, and *sua sponte* whenever it feels its own interests are jeopardized and keep affording a failed prosecutor new opportunities to change his charges, retry, and change his case. The Review Department has a mandatory duty to now enter a finding of the exoneration of the attorney of the moral turpitude charge.

---

[1] The attorney filed a motion to dismiss the moral turpitude charge on March 24, 1998 setting forth how the facts claimed of "reasonably knew or should have known that the facts concerning the aforesaid investment which he was concealing from James were material to her in making the investment decision and that she needed the funds returned to her in three or four months for investment into a condominium," stated no cause of action of an act of moral turpitude. Divining the state of mind of an investor is not part of the duties of a person offering an investment and not disclosing facts, when all of the financial records and transactions are made available to an investor to take to an accountant or a lawyer, is not a duty that is by law imposed on one offering an investment. With no case law to support such claims indicating that such is an act of moral turpitude, no cause of action was stated.

The Opinion states that, "We cannot determine the factual basis upon which the jury based its finding of malice, or oppression, or fraud, and whether it was based on fraud or breach of fiduciary duty. "Nor can we determine the nature and extent of those acts by independently reviewing the record." Opinion 18: para 1, 6-13.

The Opinion states at 15, para. 1, 6-12 that, "Our independent review establishes that the only common issues that were found against respondent by the jury under the clear and convincing standard of proof and that are necessary to support the judgment in that lawsuit are those issues that the jury found when it unanimously answered "yes" to special finding 10." Special finding No. 10 was the damage instruction concerning punitive damages and not a merit instruction. It requested the jury to consider that "[If] you fund that [the investor suffered actual injury, harm or damage caused by [the attorney's] breach of fiduciary duty or fraud, you must decide in addition whether by clear and convincing evidence you find that there was oppression, malice, or fraud in the conduct on which you base your finding of liability." Opn. 15, footnote 7. The Opinion states that, "In light of the foregoing well-established law regarding moral turpitude, we conclude that an attorney's guilt of malice, oppression, or fraud as those terms were defined for the jury in the James' lawsuit, with respect to the attorney's breach of a fiduciary duty to either a client or a non-client involves moral turpitude in violation of section 6106 as a matter of law." Opinion 17, para. 2, 15-26. It then states that, " We conclude that the commission of any or all of these acts involves moral turpitude in violation of section 6106." Opn. 16, lines 13-15.

The Opinion admits that there is not sufficient evidence in the record to establish by clear and convincing evidence that the charged facts of knowing the investor's needs and concealing facts from her occurred. Since those are the facts of which the attorney had notice in the Notice of Disciplinary Charges in support of the act of moral turpitude claim, he is entitled to an order exonerating him of the moral turpitude charge.

The automatic exoneration of the attorney of the act of moral turpitude charge is required by the decision of the United States Supreme Court in **In Re: Ruffalo** 390 U.S. 544, 550, 88 S. Ct. 1222, 1225, 20 L. Ed. 117 (1968). In **Ruffalo** the United States Supreme Court summarily reversed the disbarment decision with no remand for any further proceedings. The effect was to exonerate the attorney of the charges. It is fundamental that when a prosecutor can not prove his case, a court of law can not make up new charges and findings in violation of fundamental due process of law and then claim to remand for further proceedings consistent with its new charges. The egregious due process violation of purporting to change the charges after the trial is over compels automatic reversal of the opinion with no further proceedings permitted against the attorney on the moral turpitude charge.

In **Ruffalo** the charges were specific concerning alleged soliciting of clients through an agent. The agent testified that he did not solicit cases. He investigated them at the request of the attorney, including cases against his private railroad employer. As a result of the agent's testimony, the Board added a new charge in the middle of the trial. The new charge alleged that the attorney did conspire with his agent to prepare lawsuits against the agent's employer, "well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects [the agent] toward his employer." **Ruffalo** at 546-547. The United States Supreme Court stated the following in reversing the disbarment decision and refusing to remand for any further proceedings, at 549:

> "... the charge ... for which petitioner stands disbarred was not in the original charges made against him. It was only after he and [[the agent] testified that this additional charge was added. Thereafter , no additional evidence against petitioner relating to [the] charge ... was taken. ... There was no de novo hearing before the Court of Appeals....Rather, it rested on the Ohio's court record and findings...
>
> (At 550) Disbarment, designed to protect the public, is a punishment or penalty imposed on a lawyer. **Ex Parte Garland** 4 Wall. 333, 380, **Spevack v. Klein** 385 U.S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See **In re Oliver** 333 U.S. 257, 273.....
>
> In the present case petitioner had no notice that his employment of [the agent] would be considered a disbarable offense until after both he and [the agent] had testified (at 551) at length on all the material facts pertaining to this phase of this case. As Judge Edwards,

dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' (Citation omitted).

These are adversary proceedings of a quasi-criminal nature. Cf. **In re Gault**, 387 U.S. 1, 33. **The charge must be known before the proceedings commence.** (Emphasis added) They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh....

(At 552)

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process.

Reversed."

The charge was that the attorney knew the investor's state of mind and concealed information that was material to her. The opinion admits there is not clear and convincing evidence of any of those facts. Instead, it purports *ex parte* and *sua sponte*, and for the first time by way of a written Opinion finding culpability, to change the noticed charge of an act of moral turpitude to being any damage claim to malice or oppression or fraud in any fiduciary capacity or lawyer capacity (even though the merits of fraud were decided by a preponderance of the evidence and by a divided vote of 9-3 insufficient to sustain a finding of fraud as an act of moral turpitude). This changes the charge of an act of moral turpitude from being reasonably knowing a person's state of mind and concealing information so as to be any number of over one hundred or so different fact possibilities that were never noticed before the trial and never presented, tried, heard, decided, or permitted to be defended against. To find petitioner culpable based on uncharged misconduct would be a denial of due process. (**Rose v. State Bar** (1989) 49 Cal.3d 646, 654 [262 Cal. Rptr. 702, 779 P.2d 761].)

Because of the multiplicity of meanings to malice or oppression as set forth herein and the issue of fiduciary duty which is a new issue, upon which the jury was ambiguously instructed and obviously confused by the reference to real estate broker and lender,[2] the changing of the act of moral turpitude charge by the Opinion of this Court requires reversal and entry of a finding exonerating the attorney of the charge actually made. Due process of law does not permit this Court to make up new charges at the appellate level and make a finding of culpability based on its newly created and unnoticed charge while refusing to exonerate an accused on a charge it admits has no evidence to support it.

---

[2] In claiming that moral turpitude is conclusively established by a special verdict finding on the punitive damage claim in the civil lawsuit in which the merits were tried on the lower burden of proof of preponderance of the evidence, the jury was instructed on the Breach of Fiduciary Duty as follows and which is set forth at Exhibit 624 contained in the State Bar's July 28, 1997 filed, endorsed "Submission of Jury Instructions Given in James v. Kittrell, O,C.S.C. Case No. 78730 filed with the Hearing Department by the Office of Trials of which judicial notice is required: "A fiduciary or a confidential relationship exists whenever under the circumstances trust and confidence reasonably may be and is reposed by one person in the integrity and fidelity of another. A fiduciary relationship arises in, among other situations, the relationship between an attorney and client, the relationship between a real estate broker and lender or borrower."

The change in the charge is best evidenced by the array of possibilities of fact patterns that are opened by the fundamental addition of brand new charges. While the Opinion states that a jury finding in a damage award of malice or oppression in any fiduciary capacity is moral turpitude per se, this is far beyond the noticed charge.

The definitions given to the jury in regard to the punitive damage claim were the following:

> "Malice" means "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others."
>
> "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."
>
> "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."
>
> "Despicable conduct" is "conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people."
>
> Opn. 15, footnote 8

However, the definitions given for each term carries with them infinite new possibilities of expanded meanings applicable to any number of unnoticed fact patterns never contemplated by the term "moral turpitude," and never noticed.

Thus, "despicable" as set forth in the Thesaurus has synonyms of "abject" with a number of possible definitions including the following:"the most contemptible kind or basely cowardly;" or "base"; or "low"; or "low-down"; or "miserable"; or "pathetic"; or "pitiable"; or "pitiful"; or "vile." "Cruel" means "heartless" (deficient in kindness or compassion or mercy) or "Able or disposed to inflict pain and suffering,"or "causing suffering and pain," or "causing suffering." "Unjust" has synonyms of "partial"or "unfair," and its possible different definitions are given as "not fair," or "lacking in fairness," or "brutally unfair" or "harsh," or "violating principles of justice," or "not adhering to ethical or moral principles." "Willful" has synonyms of "by choice," or "free," or free will, and means "done by design," or "by conscious design or purpose." "Disregard" has no synonyms and means "refuse to acknowledge" as a verb. As a noun it means "letting pass without notice," or "lack of attention and due care," or "lack of care and attention." "Vile" has synonyms of "abhorrent," or "bestial," or "charnel", or "crying," or "despicable," or "detestable," or "disgustful," or "disgusting," or "distasteful," or "egregious," or "flagrant," or "foul," or "ghastly," or "ghoulish," or "gross," or "hideous," or "horrid," or "loathly," or "loathsome," or "morbid," or "nauseating," or " nauseous," or "noisome," or "objectionable," or "obnoxious," "obscene," or "outrageous," or "rank," or "repellant," or "repellent," " or "repugnant," or "repulsive," or "revolting," or "scrimy," or "sepulchral," or "sickening," or "swinish," or "unpleasant," or "verminous," or "yucky" with adjective meanings of "causing or able to cause nausea," "of the most contemptible kind," or "morally reprehensible," or "thoroughly unpleasant." "Base" has definitions of "morally reprehensible," or "not of the nobility," and an archaic meaning: "of the most contemptible kind." "Contemptible" has a definition of "deserving of contempt or scorn" and a synonym of "unworthy." "Contempt" means "lack of respect accompanied by a feeling of intense dislike," or "open disrespect for a person or thing," or "a willful disobedience to or disrespect for the rules of court." "Scorn" means "lack of respect accompanied by a feeling of intense dislike," or "open disrespect for a person or thing" and it has no synonyms. "Miserable" means "very unhappy," or "full of misery,"or "deserving or inciting pity," or "of the most contemptible kind;" or "of very poor quality or condition," or "characterized by misery," or "contemptibly small in amount," with synonyms of "bad," or "homesick," or "lovesick," or "nostalgic," or "regretful," or "sorry," or "woeful," or "wretched." "Wretched," means "of very poor quality or condition;" or "very unhappy;" or "full of misery," or "deserving or inciting pity;" or "characterized by misery" with synonyms of "bad," or " base," or "bum," or "cardboard," or "cheap," or "cheesy," or "chintzy," or "coarse," or "coarsened," or "commercial," or "common," or "crude," or "crummy," or "deplorable," or "execrable," or "flimsy," or "less," or "low-grade," or "mediocre," or "miserable," or "poor," or " punk," or "ropey," or "scrawny," or "scrubby," or "second class," or "second-rate," or "shoddy," or "sleazy," or "stunted," or "tatty," or "tawdry," or "third-rate," or "tinny," or "utility," or "utility-grade," or "woeful." "Loathsome" means "unwholesome," or "arousing aversion or disgust" with synonyms of "insalubrious," or "insubstantial," or "jejune," or "morbid," or "noisome, " or "noxious," or "offensive," or "unhealthful," or "unhealthy." "Despised" means as a verb,"look down upon" and it has no synonyms.

The Opinion states that the noticed charge is to be ignored and the required exoneration of the attorney not found, because moral turpitude as a matter of law is conclusively established because a jury could have found that as a real estate broker (who was not the real estate broker for this plaintiff) the attorney committed an act that was yucky.

The Opinion claims that any act of a person is moral turpitude if the person has a law license as any act by an attorney is considered pathetic and is looked down upon and despised by any ordinary decent person as lawyers are always looked down upon and despised by any ordinary decent person. That, according to the Opinion, is the malice for punitive damages and therefore, an act of moral turpitude conclusively shown.

Any pathetic act by a person who has a law license even if the act has no relationship to the practice of law, as in this case, is conclusively an act of moral turpitude if the act can be claimed to be "yucky" and to "violate principles of justice," or "not adhere to ethical or moral principles" and causes suffering. That, according to the Opinion, is the oppression for punitive damages and therefore, an act of moral turpitude conclusively shown.

The reduction of an act of moral turpitude to a question of adhering to the spiritual, religious, or aesthetic subjective and unknown values of unidentified persons renders the term totally devoid of any notice sufficiency.

Since the law is clear that the Review Department may not ignore the charge that was actually made and refuse, since it admits there is no evidence to support the charge made, to enter an order exonerating the attorney, its claim to finding culpability on its new charges claiming that moral turpitude is conclusively shown by that which is undetermined and which may amount to a yucky act by a person who happens to have a law license which causes suffering not only denies due process of law but is "coram non judice" and void. So much of a judgement which exceeds the issues noticed and litigated is void. **Baar v.**

Smith 201 C 87, 255 P. 827. The Opinion is required to be reconsidered so as to enter the required order exonerating the attorney of the act of moral turpitude charge.

C. The Admission of an Insufficiency of Evidence to Support the Business Transaction Charges Requires Entry of an Order Exonerating the Attorney of Those Charges

The Opinion states that there was not clear and convincing evidence to support a claim that the investor was a client and that any duties owed to a client concerning entering into a business transaction were violated. Opn. 19, para. three, 14-16, 20, 1-2, para. 1:3-10. It admits that the issue was not adjudicated in the civil lawsuit and that the prosecutor presented no evidence on the issue. Those admissions compel a finding that the attorney is exonerated of the charge of violating the former 3-300 (business transaction) rule. ...The Opinion states that, "[W]e cannot exercise our authority to independently review and reweigh the evidence in the James lawsuit under the clear and convincing standard of proof and make our findings with respect to the charged rule 3-300 violations. ... [We] reverse... and remand the matter for a new trial on the issue of respondent's culpability of former rule 3-300 violations." Opn. 20: para. 1, 7-13. It is a denial of due process to refuse to enter the required exoneration of an attorney and to provide a prosecutor a second bite at the apple when the prosecutor knowingly failed to present sufficient evidence on the charge to sustain it. The Review Department order "specifically pointed out that collateral estoppel applies only to those issues that the jury in the James lawsuit found by clear and convincing evidence." Opn. 6: para. 3, 26, 7:

1-2. It was the prosecutor who knew that no issue of the existence of a client or of any business transaction rule was ever adjudicated, mentioned, or tried in the civil proceeding in any way, shape, or manner. It was the prosecutor's duty to present clear and convincing evidence. He failed. He loses, and that is the law. The attorney is entitled to be exonerated as a matter of law. When "[t]he charges of unprofessional conduct are not sustained by convincing proof to a reasonable certainty," the attorney is entitled to a judgment of exoneration of the charges. **McCray v. State Bar** (1985) 38 Cal.3d 257, 263 [211 Cal. Rptr. 691, 696 P.2d 83, **Aronin v. State Bar** 52 Cal. 3d 276, at 282; 801 P.2d 403, 276 Cal. Rptr. 160. **Kapelus v. State Bar** 44 Cal.3d 179, 184.

The Opinion must be reconsidered to enter the required exoneration of the attorney of the former 3-300 (business transaction) charges.

C. The Constitutional Right to Notice was Violated

Four constitutional violations of the right to notice as required for procedural due process of law inure in the Opinion as written: the lack of notice in the act of moral turpitude statute, the lack of precision in the Notice of Disciplinary Charges and the failure to state a cause of action in it, the lack of notice of the Review Department's intent to find culpability based on charges never made, and the Review Department finding culpability of unnoticed charges of an act of moral turpitude. The preceding discussion indicates that violations two through four are conclusively established and require a finding of exoneration of the attorney of the act of moral turpitude and the business transaction charges.

1. The Act of Moral Turpitude Statute Lacks Fair Notice and the Attorney's Conduct Does not Clearly Fall Within the Moral Turpitude Constitutional Definition

The Opinion states that, "We find no merit to respondent's contention that the term 'moral turpitude' in section 6106 is unconstitutionally vague. "It is well established that 'one to whose conduct a statute clearly applies may not successfully challenge it for vagueness.' [Citation] **In re Kelley** (1990) 52 Cal. 3d. 487, 497. Thus, even assuming for the sake of argument that the term 'moral turpitude' in section 6106 is so broad that people of common intelligence must guess at its meaning, we could not sustain respondent's vagueness challenge because respondent's misconduct as found by the jury in its answer to special finding 10 clearly falls within the scope of section 's 6106 proscription of acts involving moral turpitude. (Ibid)."Opn. 19, para 1, 1-2.

Contrary to the opinion, and as indicated above based on the over one hundred meanings that could be ascribed to the punitive damage verdict, there is nothing concrete that can be gleaned with any degree of certainty about what the verdict means. As held by the United States Supreme Court in **United States v. Laub** 385 U.S. 475 (1967), "Crimes are not to be created by inference. They may not be constructed *nunc pro tunc.* Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in **Raley v. Ohio**, 360 U.S. 423, 438, we may not convict `a citizen for exercising a privilege which the State clearly had told him was available to him." As **Raley** emphasized, criminal sanctions are not supportable if they are to be imposed under "vague and undefined" commands (citing **Lanzetta v. New Jersey**, 306 U.S. 451 (1939)); or if they are "inexplicably contradictory" (citing **United States v. Cardiff**, 344 U.S. 174 (1952)); and certainly not if the Government's conduct constitutes "active misleading" (citing **Johnson v. United States**, 318 U.S. 189, 197 (1943))."

A statute that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." **Connally v. General Construction Co.**, 269 U.S. 385, 391 (1926). The Fourteenth Amendment's Due Process Clause "[insists] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." **Grayned v. City of Rockford**, 408 U.S. 104, 108-109 (1972). This requirement "applies with particular force in review of laws dealing with speech." **Hynes v. Mayor of Oradell,** 425 U.S. 610, 620 (1976). "A man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser," **Smith v. California**, 361 U.S. 147, 151 (1959). These guarantees apply fully to attorney disciplinary proceedings. **In re Ruffalo**, 390 U.S. 544, 550 (1968).

The Opinion fails to state any of the controlling law from the United States Supreme Court which compels a finding that the act of moral turpitude statute is unconstitutionally vague and that it is both irrelevant whether the statute clearly applies to the accused in invalidating the statute and any discipline based on it and that any claim to avoiding a declaration of vagueness by asserting that the statute clearly applies to the conduct at issue does not apply to a statute that has no core and has never been determined to apply to any of the purported possible acts involved in this case.

Relative to the sole citation in the Opinion to **In re: Kelley** (1990) 52 Cal. 3d. 487, 497 for the proposition that one to whom a statute clearly applies may not challenge its vagueness as applied, it is superseded by the controlling decisions of the United States Supreme Court to which this body is required to defer in its decision-making under the Supremacy Clause and the facts and law of **Kelley** are inapposite to the facts and law herein at issue. In **Kelley** the attorney had previously been convicted of the crime of driving under the influence and was, while under an order of the court to refrain from drinking and driving, arrested and convicted again for the same crime. In determining that the term in the statute permitting discipline for the commission of a crime which involves "other misconduct warranting discipline" was not unconstitutionally vague as applied to the attorney's conduct, the court emphasized that the attorney had violated a court order prohibiting her from drinking and driving. The Court stated the following:

> "....[W]e have disagreed about the application of the "other misconduct warranting discipline" standard. The disagreement has focused on whether application of the `other misconduct warranting discipline' standard requires a nexus between the attorney's misconduct and the practice of law. (Compare **In re Rohan, supra**, 21 Cal.3d at p. 204 [lead opn. by Clark, J.], with id. at p. 205 [opn. by Tobriner, J.].) This issue, however, need not be resolved here where there exists a nexus between petitioner's misconduct and her fitness to practice law. This nexus is established in two ways. First, petitioner's most recent conviction was in violation of a court order directed specifically at petitioner following her first conviction. Petitioner demonstrated a complete

disregard for the conditions of her probation, the law, and the safety of the public. (See **In re Alkow** (1966) 64 Cal.2d 838 [51 Cal. Rptr. 912, 415 P.2d 800, 21 A.L.R.3d 882.

···It is true, of course, that if a disciplinary standard is so vague that no reasonable consensus may be formed as to its proper meaning, its application is constitutionally suspect. (**Morrison v. State Board of Education**, [52 Cal.3d 497] **supra**, 1 Cal.3d at pp. 231-233.) We do not believe, however, that our application of the challenged standard to the facts presented here encounters constitutional difficulties. It is well established that "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." (See **Cranston v. City of Richmond** (1985) 40 Cal.3d 755, 764 [221 Cal. Rptr. 779, 710 P.2d 845], quoting **Parker v. Levy** (1973) 417 U.S. 733, 756 [41 L. Ed.2d 439, 457-458, 94 S.Ct. 2547].) Thus, even if a disciplinary standard is so broad that people "of common intelligence must necessarily guess at its meaning and differ as to its application" (**Connally v. General Constr. Co.** (1926) 269 U.S. 385, 391 [70 L. Ed. 322, 328, 46 S. Ct. 126]), this fact alone is insufficient to sustain a vagueness challenge where the misconduct at issue is clearly within the scope of the disciplinary standard. We think it clear that attorneys should realize that repeated failure to conform their conduct to the requirements of the criminal law and court orders specially imposed on them may call into question their integrity as officers of the court and their fitness to represent clients. Given our inherent power to control the practice of law in order to protect the profession and the public, attorneys must understand that such misconduct may therefore warrant professional discipline. Such a standard does not hold attorneys to an arbitrarily high moral code of conduct. It requires nothing more than that attorneys conform to the requirements of the law in the manner of all other persons. For these reasons, the `other misconduct warranting discipline' standard is not impermissibly vague as applied to petitioner's criminal conduct."

This case does not involve a criminal conviction. This case does not involve a violation of a court order. There is a civil jury verdict concerning a failed investment with punitive damages imposed based on anything that could be claimed to be a yucky act which caused suffering that offends someone's spirituality..

The absence of any authority for the Opinion's claims that malice, fraud, or oppression in a civil proceeding concerning the imposition of punitive damages is clearly within the scope of the term "an act of moral turpitude," indicates that whatever conduct was involved in the punitive damage finding, which the Opinion admits it can not figure out, is not and could never be held to be "conduct [to which the moral turpitude] statute clearly applies." **Parker v. Levy** (1973) 417 U.S. 733, 756 [41 L. Ed.2d 439, 457-458, 94 S.Ct. 2547].)

The absence of any authority for the claim of inclusion of the unknown acts as acts of moral turpitude is exemplified by the fact that the Opinion cites irrelevant cases and dicta which have no application to the facts in this case. In support of its claim that an act of moral turpitude means any act of any kind, it cites, with three exceptions, criminal conviction cases. Those criminal cases involve the question whether the crime of which the attorney was convicted involves moral turpitude. The Opinion's claim that an act of moral turpitude is "An act of baseness, vileness, or depravity..." **In re Craig** , 12 Cal.2d

93, at 97 (1938) appearing at Opn. 16, para 1, 20-23, emanates from a case involving the disbarment of a former judge for his conviction of the felony crime of a violation of section 88 of title 18 of the United States Code, in that he, with certain other defendants therein named, did conspire to obstruct and impede the due administration of justice.

The moral turpitude claimed to be any ""any crime or misconduct without excuse or any honest or immoral act," appearing at Opn. 16, para. 1, 23-26, emanates from **Chadwick v. State Bar** (1989) 49 Cal.3d. 103, 110. The attorney was criminally convicted of the federal misdemeanor crime of violating federal statutes prohibiting insider trading. He was also charged with fraud and misrepresentation in lying to federal authorities about his criminal act. The "charges were based on three separate acts: petitioner's illegal purchase of stock options, his agreement to lie to the SEC, and his actual lie to the SEC. The State Bar alleged that each of these acts involved moral turpitude. A hearing was held before a one-member hearing panel which adopted the stipulation as to the facts and circumstances surrounding the case. ...[The attorney] testified before the hearing panel that at the time of his testimony, he considered his insider trading to be an act of dishonesty and theft because he was stealing from other investors. ...He stated that at the time of the conduct, however, he did not consider the conduct to involve dishonesty or theft. ... The Court concludes that , "Crimes which necessarily involve an intent to defraud, or dishonesty for personal gain, such as perjury (**In re Kristovich** (1976) 18 Cal.3d 468, 472 [134 Cal. Rptr. 409, 556 P.2d 771]), grand theft (**In re Basinger** (1988) 45 Cal.3d 1348, 1358 [249 Cal. Rptr. 110, 756 P.2d 833]) and embezzlement (**In re Ford, supra**, 44 Cal.3d at p. 813) may establish moral turpitude." The crime of insider trading was held to be a crime of fraud as it deprived other persons of profits to which they rightfully would be entitled but for the attorney's fraud. The decision stated that the attorney engaged in a "fraudulent, deceptive or manipulative act or practice. Since petitioner was convicted of a crime requiring the element of fraudulent conduct, and such conviction is conclusive proof that petitioner committed the elements necessary to constitute the offense (**In re Ford, supra**, 44 Cal.3d 810, 815), we agree with the department's finding that petitioner's act involved moral turpitude." The decision also stated that the attorney's agreement to lie to the government also involved moral turpitude. There is no claim that any immoral act is an act or moral turpitude as a matter of law as asserted in the Opinion.

The Opinion's claim that "conduct which indicates that an attorney is unable to meet the professional or fiduciary duties of his practice may show him or her to be unfit to practice and constitute moral turpitude," is taken from **In re Strick** (1983) 34 Cal. 3d. 891, 901, and appears at Opn. 17, para. 1, 1-3. The attorney killed a person who posed no threat to him in a drugged state and then left the dead person's naked body in an open hallway. He was convicted of manslaughter and assault and also of passing a forged prescription for a controlled substance. As stated by the Court in **Strick**, "Petitioner committed two serious offenses, one of which resulted in the needless loss of a young man's life. Considering the trial testimony and resolving all doubts in petitioner's favor (see **In re Higbie, supra**, 6 Cal.3d at p. 569) the evidence shows moral turpitude. Petitioner knowingly engaged in a prolonged course of illegal, drug-related conduct. The killing and assault resulted from his show of deadly force in an attempt to intimidate two persons younger than himself who presented no threat to him into acceding to his demand that they immediately rise from their drugged-sleep and leave his house. After the shooting occurred, petitioner callously left the victim's naked body in a common hallway. He initially denied knowledge of the location of the weapon and sought to implicate the victim of the assault in the killing, but later admitted hiding the gun and initiating the confrontation." Not only did the dicta have nothing to do with the facts, the extrapolation of moral turpitude from a case involving an attorney who kills a human being while in a drugged state to a case involving a civil judgment concerning a failed business investment is irrational, arbitrary, capricious, and based on whim and caprice in violation of fundamental due process of law. **Schware v. Board of Bar Examiners of State of New Mexico** 353 U.S. 232, 238-239, 77 S. Ct. 752, 756, 1 L. Ed. 796.

The Opinion's statements that, "...[A]n attorney's deliberate breach of a fiduciary duty to a client involves moral turpitude as a matter of law, " and "[E]ven an attorney's non-deliberate breach of fiduciary duty to a client involves moral turpitude if the breach occurred as a result of the attorney's gross carelessness and negligence," and citation to **Lipson v. State Bar** (1991) 53 Cal. 3d. 1010, 1020, for these legal claims is a false citation. Opn. 17: para. 1, There are no such statements, claims, or suggestions in the **Lipson** decision. The attorney in **Lipson**, at 1010 "borrowed money from two clients without complying with the Rules of Professional Conduct and misappropriated funds of one of those clients from his trust account. [The attorney had] not repaid the loans, nor ha[d] he returned the misappropriated funds." The stealing of a client's funds is not only an act of fraud which falls within the clear purview of an act of moral turpitude, it also is a crime involving moral turpitude. The Opinion states there is insufficient evidence to establish that the investor was a client. Opn. 19: para. 3, 14-26, 20, 1-2, para. 1-13. There is no claim to any misappropriation of any funds. There is no suggestion of any crime involved in the civil lawsuit.[3]

The claim that moral turpitude is "an attorney who accepts responsibility of a fiduciary nature is held to the high standards of the legal professional whether or not he acts in his capacity of an attorney," relies on two cases which do not involve moral turpitude. The Opinion misstates the quotation by deleting the explanation that accompanies it which states that, "[The attorney] must maintain proper books of account and records of transactions, and he may not commingle client's funds or use them for personal purposes. (Id., at p. 713; **Simmons v. State Bar** (1969) 70 Cal.2d 361, 365 [74 Cal. Rptr. 915, 450 P.2d 291]; **Clark** v. **State Bar** (1952) 39 Cal.2d 161, 166-170 [246 P.2d 1].)" **Worth v. State Bar** 17 Cal. 3d. 337 (1976), at 341. There is no suggestion in this case that the investor was a client and the findings state there is insufficient evidence to support such a finding. There is no suggestion in this case that the attorney did not maintain proper brooks or account and records. There is no suggestion of any commingling of any funds. There is no suggestion that the attorney used the investment proceeds for any personal purposes. In sum, there are no facts in common with the dicta relied on. The other citation for the above proposition involves an attorney who borrowed money from a client and fraudulently guaranteeing a loan without complying with the business transaction rule. **Beery v. State Bar** (1987) 43 Cal. 3d. 802, 813. Opn. 17: para. 1, 14.

---

[3] The Opinion also cites an uncitable case involving Attorney Rubens. California Rules of Court, Rule 977 (a)Rule 977 (a) states that, "An opinion that is not ordered published [by the California Supreme Court] shall not be cited or relied on by a court or party in any other action or proceeding...." The knowing use of such a citation is a violation of the Rules of Professional Conduct for attorneys. (See Rules Prof. Conduct, rule 7-105rule 7-105). The California Code of Judicial Conduct applicable to State Bar judges requires that they "follow the law."

The Opinion's claim that "an attorney's guilt of malice, oppression, or fraud with respect to his commission of an act of fraud, even in the absence of a fiduciary relationship, involves moral turpitude as a matter of law," which cites **In re Hallinan** (1954) 43 Cal. 2d. 243, 247-248, is a claim without any citation for its authority. **Hallinan** does not state such a proposition. **Hallinan** states the opposite proposition. The attorney's conviction of the crime of "willfully and knowingly filing false and fraudulent income tax returns" was held to not necessarily involve moral turpitude as specific intent to defraud was not an essential element of the crime as opposed to willfulness. Thus, while "some measure of bad faith or evil intent is an essential element [of the crime], ... which can be inferred from evidence that the defendant acted without justifiable excuse, without ground for believing his acts were lawful, or in careless disregard of the lawfulness of his acts," [this] does not necessarily involve moral turpitude." **Hallinan** at 252. Contrary to the Opinion's claim, there is no mention of punitive damages findings of malice, or oppression, or fraud establishing moral turpitude and the decision supports the claim that those findings in a punitive damages award are not moral turpitude as a matter of law.

The finding from these criminal conviction cases and the one non-criminal conviction case, to wit, **Lipson**, which involved theft of a client's funds, is that moral turpitude as a matter of law is limited to an actual act of fraud which requires as an element of the offense and the findings a specific intent to defraud. These findings comport with the limitation on moral turpitude required by the United States Supreme Court in **Jordan** and can not be expanded beyond that limiting meaning to be any act which an adjudicator subjectively considers immoral or spiritually wrong.

The Opinion has no support in the case law for a proposition that moral turpitude is found as a matter of law based on a punitive damage award in a civil lawsuit where either malice, or oppression, or fraud related to any claimed fiduciary duty is the basis of the award. Not only does it have no support. The case law indicates such a claim is patent error of serious constitutional law. **Hallinan.**

Since all of the cited cases involved moral turpitude findings based on the commission of a crime and, save one case, the conviction of the attorney of a crime involving the specific intent to defraud or kill someone, there is no basis to claim that the civil lawsuit punitive damage award for malice, or oppression, or fraud involves moral turpitude as a matter of law.

As held in **Levy,** at 754, the bar to raising a vagueness challenge applies only when the conduct is clearly, based on noticed language and case law, clearly proscribed by the plain meaning of the words. There the Court held that, "...[T]here also cannot be the slightest doubt under the military precedents that there is a substantial range of conduct to which both articles clearly apply without vagueness or imprecision. It is within that range that appellee's conduct squarely falls, as the Court of Appeals recognized: `Neither are we unmindful that the Manual for Courts-Martial offers as an example of an offense under Article 134, `praising the enemy, attacking the war aims of the United States, or denouncing our form of government.' With the possible exception of the statement that `Special

Forces personnel are liars and thieves and killers of peasants and murderers of women and children,' it would appear that each statement for which [Levy] was court-martialed could fall within the example given in the Manual."

The Court noted that the Levy military court martial case case did not present the issue that there was no core to the regulations, and that the defendant "had fair notice from the language of each article that the particular conduct which he engaged in was punishable. This is a case, then, of the type adverted to in **Smith v. Goguen**, in which the statutes "by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain." **Levy,** at 756.

The act of moral turpitude statute has no core as the statements from the Opinion indicate which clearly invalidates it.[4] It is everything and nothing. Constitutionally, it is limited to cases involving a specific intent to defraud and findings of fraud or the most heinous of crimes, to wit, murder or manslaughter.[5] In this case, there are no cognizable findings of fraud as the finding on that civil cause of action was based on a relaxed definition permitting recklessness to be a basis for the finding and on a preponderance lower standard of proof and the jury split nine to three on the finding, which are material facts which the Opinion wrongfully excludes in derogation of it duty to provide fundamental fairness to the attorney. Exhibit L- 1 and I.

---

[4] The United States Supreme Court has on more than one occasion invalidated statutes under the Due Process Clause of the Fifth or Fourteenth Amendment because they contained no standard whatever by which criminality could be ascertained, and the doctrine of these cases has subsequently acquired the shorthand description of "void for vagueness." **Lanzetta v. New Jersey**, 306 U.S. 451 (1939); **Winters v. New York**, 333 U.S. 507 (1948). In these cases, the criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." **Coates v. City of Cincinnati**, 402 U.S. 611, 614 (1971).

[5]

Since there is no clear application of the act of moral turpitude statute to the civil lawsuit's punitive damage award and finding, the Opinion is required to be corrected to delete such a claim and to rule that there is no authority for such a claim.

2. The Opinion Violates Due Process in Failing to Address the Unconstitutionality of Moral Turpitude for Overbreadth

The Opinion fails to address the overriding constitutional issue of over breadth of the statute prohibiting in any capacity "any act of moral turpitude." (Section 6106) Opn.19, para, one, 1-10. By asserting a lack of standing to raise a vagueness challenge to the term "act of moral turpitude," it ignores the United States Supreme Court's decisions that standing is not necessary to an over breadth challenge. As such, the Opinion is required to be reconsidered and the conclusion of law of an act of moral turpitude from jury verdicts addressing punitive damages reversed as the act of moral turpitude has been properly challenged for over breadth and it is unconstitutional on its face for over breadth. The Opinion finding an act of moral turpitude is required, as a matter of adherence to the Supremacy Clause of the United States Constitution, to be reversed and an order entered exonerating the accused of the act of moral turpitude charge.

Over breadth analysis addresses whether the statute reaches a substantial amount of speech and fails to have the two requirements for a restriction on the first amendment right to freedom of speech, to wit, a compelling state interest and a narrowly drafted statute which targets solely the speech which the State has a compelling state interest in chilling, quashing, censoring, condemning, or punishing. As held in **Buckley v. Valeo**, 424 U.S. 1, 60-68,96 S.Ct. 612, 654-658; 46 L.Ed. 2d 659 (1976),"any infringement on such rights must be based on a compelling governmental interest; even then, the state must demonstrate that it has chosen the least restrictive means to further such an interest."**Buckley v. Valeo**, 424 U.S. 1, 60-68 96 S.Ct. 612, 654-658; 46 L.Ed. 2d 659 (1976) The statute is unconstitutionally broad when it is susceptible of application to conduct protected by the First Amendment. (See **Dandridge v. Williams** (1970) 397 U.S. 471, 90 S. Ct. 1153Dandridge v. Williams (1970) 397 U.S. 471, 90 S. Ct. 1153)."

Even one to whom the statute applies may challenge a statute for over breadth. **Pottinger v. City of Miami** 810 F. Supp. 1551 (S.D. Fla. 1992)Pottinger v. City of Miami 810 F. Supp. 1551 (S.D. Fla. 1992). Over breadth relates to whether the statute intrudes upon conduct which is protected by the United States Constitution, including freedom of speech. **Broderick v. Oklahoma** 413 U.S. 601, 613, 37 L. Ed. 2d. 830, 93 S. Ct. 2908 (1973)Broderick v. Oklahoma 413 U.S. 601, 613, 37 L. Ed. 2d. 830, 93 S. Ct. 2908 (1973). See **Gentile, supra** Gentile, supra. Such statutes are "not restricted to the evil with which they are said to deal." **Butler v. Michigan** 352 U.S. 380, 383, 77 S. Ct. 524, 526, 1 L.Ed.2d. 412 (1957)Butler v. Michigan 352 U.S. 380, 383, 77 S. Ct. 524, 526, 1 L.Ed.2d. 412 (1957). Such statutes require a greater degree of specificity and precision than is required to fulfill due process or equal protection requirements. **Adamian v. Jacobsen** 523 F. 2d. 929 (Ninth Cir. 1975), appeal after remand 608 F.2d. 1224, cert. denied 100 S. Ct. 2158, 446 U.S. 938, 64 L. Ed. 2d. 791Adamian v. Jacobsen 523 F. 2d. 929 (Ninth Cir. 1975), appeal after remand 608 F.2d. 1224, cert. denied 100 S. Ct. 2158, 446 U.S. 938, 64 L. Ed. 2d. 791. Such statutes seek to burn the house down to roast the pig and chill the exercise of protected freedoms. What they burn down is the first amendment rights of attorneys. **Dombrowski v. Pfister** 380 U.S. 479, 491, n.7, 14 L. Ed. 2d.22, 85 S. Ct. 1116 (1965)Dombrowski v. Pfister 380 U.S. 479, 491, n.7, 14 L. Ed. 2d.22, 85 S. Ct. 1116 (1965). Unconstitutionally for over breadth applies when the statute reaches a substantial amount of conduct, where it penalizes conduct that every person would regard as lawful, and where it punishes without a clear and present danger justifying the infringement on the first amendment right to freedom of speech. **Massachusetts v. Oakes** 105 L. Ed.2d. 493 (1990)Massachusetts v. Oakes 105 L. Ed.2d. 493 (1990).

"The First Amendment doctrine of substantial over breadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally over broad as to others. **Board of Airport Commr's of Los Angeles v. Jews for Jesus** 482 U.S. 569, 574, 96 L. Ed. 2d. 500, 107 S. Ct. 2568 (1987)Board of **Airport Commr's of Los Angeles v. Jews for Jesus** 482 U.S. 569, 574, 96 L. Ed. 2d. 500, 107 S. Ct. 2568 (1987); **Brockett v. Spokane Arcades, Inc**. 472 U.S. 491, 503-504, 86 L.Ed.2d. 394, 105 S. Ct. 2794 (1985)**Brockett v. Spokane Arcades, Inc**. 472 U.S. 491, 503-504, 86 L.Ed.2d. 394, 105 S. Ct. 2794 (1985). See generally Monaghan, Overbreadth, 1981 S.Ct. Rev. 1. The doctrine is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions. **Schaumburg v. Citizens for a Better Environment** 444 U.S. 620, 634, 63 L. Ed. 2d. 73, 100 S. Ct. 826 (1980)Schaumburg v. Citizens for a Better Environment 444 U.S. 620, 634, 63 L. Ed. 2d. 73, 100 S. Ct. 826 (1980). Over breadth doctrine has wide-ranging effects, for a statute found to be substantially over broad is subject to facial invalidation." **Massachusetts, supra**, p. 500Massachusetts, supra, p. 500.

The act of moral turpitude statute is so broad and is so broadened by this Opinion that it definitely violates the over breadth doctrine and is unconstitutional on its face as it has no core and it sweeps unnecessarily broadly so as to quash the freedom of speech of attorneys.

The United States Supreme Court has made clear that the term "moral turpitude" is limited to actual cases of intentional and knowing fraud. It does not include reckless statements. **Jordan v. De George** 341 U.S. 223; 71 S. Ct. 703; 95 L. Ed 886 (1951)Jordan **v. De George** 341 U.S. 223; 71 S. Ct. 703; 95 L. Ed 886 (1951). This United States Supreme Court decision was by a 5 to 4 vote in 1951. It is probable that the United States Supreme Court, since the American Bar Association has declared the term "act of moral turpitude" too vague to be enforceable as a rule of professional conduct for attorneys that the reasoning of the dissent in **Jordan,** at 235 must be applied to declare the California statute prohibiting an act of moral turpitude unconstitutional for over breadth and vagueness Justice Jackson stated, at **Jordan,** at 235, as follows:

> "Congress did not see fit to state what meaning it attributes to the phrase `crime involving moral

> turpitude.' It is not one which has settled significance from being words of art in the profession. If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral. The Government confesses that it is `a term that is not clearly defined,' and says: `The various definitions of moral turpitude provide no exact test by which we can classify the specific offenses here involved......Black's Law Dictionary defines turpitude as: `Inherent baseness or vileness of principle or action; shameful wickedness; depravity.'..... Bouvier's Law Dictionary, Rawles Third Revision, defines `moral turpitude' as `An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' Except for the Court's opinion, there appears to be universal recognition that we have here an undefined and undefinable standard.".

Levy pointed out how Courts may be confused between the vagueness andoverbreadth doctrines, which are different and distinct constitutional principles, when it stated that, "The result of the Court of Appeals' conclusion that Levy had standing to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth,..."

Statutes which apply to speech are tested under stricter tests than statutes which do not apply to speech. In this case, the conclusion of law that a jury verdict of an award of punitive damages for malice, or oppression, or fraud, clearly attacks the attorney's freedom of speech. This requires that the act of moral turpitude statute be tested by the strict compelling state interest test and narrow specificity requirements of the over breadth doctrine which requires no inquiry into whether the conduct of the accused clearly falls within the language of the statute as the statute is attacking everyone's speech. **Gooding v. Wilson**, 405 U.S. 518, 520; 92 S. Ct. 1103; 31 L.Ed. 2d 408 (1972). As held by the United States Supreme Court, "We apply ...[th[is] over breadth doctrine]... quite rigorously when a statute is directed at "pure speech," especially to its expressive content.. **Broadrick v. Oklahoma** 413 U.S. 601, 615; 93 S. Ct. 2908; 37 L. Ed. 2d 830 **Broadrick v. Oklahoma** 413 U.S. 601, 615; 93 S. Ct. 2908; 37 L. Ed. 2d 830 (1973); **Parker v. Levy** 417 U.S. 733, 760; 94 S.Ct. 2547; 41 L.Ed. 2d 439 (1974)**Parker v. Levy** 417 U.S. 733, 760; 94 S.Ct. 2547; 41 L.Ed. 2d 439 (1974).

The Opinion asserts that act of moral turpitude applies to any act of immorality. **Chadwick**. It asserts that act of moral turpitude applies to any act of baseness, any act of vileness, or any act of 'depravity in the private and social duties which a man owes to his fellow man or to society in general,' **Craig.** It asserts that it applies to any act which indicates that an attorney is unable to meet the professional and fiduciary duties of his practice. **Strick.** It asserts that it means any non-deliberate breach of any fiduciary duty to a client. **Lipson**. It asserts that it applies to any breach resulting from the attorney's gross carelessness and negligence. **Worth, Beery**.

The Opinion asserts for the time in the history of the United States and in derogation of the plain meaning of the United States Supreme Court limiting act of moral turpitude to a proven act of fraud based on specific intent, **Jordan,** that it applies to a civil lawsuit and a jury verdict concerning damages which awards punitive damages and to the jury finding of any malice, or oppression, or fraud concerning any trusting relationship (refer footnote seven) incidental to the award of any punitive damages. Such broadness clearly invalidates the act of moral turpitude statute. To claim that any punitive damage award in a civil lawsuit is an act of moral turpitude is to so expand a limiting construction given to a term by the United States Supreme Court beyond reason and to adjudicate based on subjectivity, whim, caprice, and spiritual values which have no place in a quasi-criminal proceeding and which clearly deny to the attorney the due process and the equal protection of the law.[6].

---

[6] The Opinion is required to be reconsidered as this is the first time in the history of the United States that a claim to a punitive damage award in a civil lawsuit is claimed to be conclusively an act of moral turpitude. By applying a new claimed doctrine that has no support in any law to this attorney for the first time is to invidiously discriminate against him for raising the unconstitutionality of the procedures and the financial interest of the State Bar adjudicators, including the ones issuing this Opinion, and to pursue a bad faith and vindictive prosecution intended to chill and to prevent an adjudication of the constitutional issues properly presented. This first time application without notice to this attorney, *per se*, is unconstitutional as a fundamental denial of the equal protection of the law and the fairness, detachment, and impartiality required in a quasi-criminal proceeding. "No state shall deny to any person within its jurisdiction the equal protection of the laws." **Fuentes v. Shevin** 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972); **Mullane v. Central Hanover Tr. Co.** (1950) 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865; **Endler v. Schutzbank** (1968) 68 Cal. 2d 162, 65 Cal. Rptr. 297, 436 P.2d 297; **Bell v. Burson**, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 S.Ct. 1011, 25 L.Ed. 2d 287; **Kelly**, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." **Sweatt v. Painter**, 339 U.S. 629, 635 (1950) (quoting **Shelley v. Kraemer**, 334 U.S. 1, 22 (1948). . . . "The guaranty of equal protection of the laws is a pledge of the

Due to the facial over breadth of the term "act of moral turpitude in the state statute, the attorney is entitled to an order exonerating him of that charge due to inherent unconstitutionality of the term.

D. The Constitutional Rights in a Quasi-Criminal Proceeding to Defense, Cross-Examination, Confrontation, Findings of Fact and Conclusions of Law based on Facts are Violated by Denial of the Right to a Trial and an Appeal Process which Fails to Adheres to the Requirements of Due Process of Law

---

protection of equal laws.'" **Skinner v. Oklahoma** ex. rel. Williamson, 316 U.S. 535, 541 (1942) (quoting **Yick Wo v. Hopkins**, 118 U.S. 356, 369 (1886). Vindictive prosecution claims arise when a defendant is penalized for exercise of statutory or constitutional rights by the imposition of a higher sentence or institution of increased charges, **United States v. Williams** 730 F.2d 1218,1221 (Ninth Cir. 1984). **United States v. Williams** 730 F.2d 1218,1221 (9th Cir. 1984), or retaliatory imposition of additional penalties for exercise of a legal right. **United States v. Groves**, 571 F.2d 450 (9th Cir. 1978) **United States v. Groves**, 571 F.2d 450 (9th Cir. 1978); **United States v. De Marco**, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827, 98 S. Ct. 105, 54 L. Ed. 2d 85 (1977)United States v. De Marco, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827, 98 S. Ct. 105, 54 L. Ed. 2d 85 (1977); **United States v. Alvarado-Sandoval**, 557 F.2d 645 (9th Cir. 1977). United States v. Alvarado-Sandoval, 557 F.2d 645 (9th Cir. 1977). As stated in **United States v. Williams** 730 F.2d 1218,1221 (9th Cir. 1984), "Vindictive prosecution usually involves retaliatory imposition of additional penalties against a defendant who, after indictment, exercises some legal right, e.g., to attack his conviction, to file a motion to suppress, or to demand a speedy trial. See **United States v. Groves**, 571 F.2d 450 (9th Cir. 1978); **United States v. De Marco**, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827, 98 S. Ct. 105, 54 L. Ed. 2d 85 (1977); **United States v. Alvarado-Sandoval**, 557 F.2d 645 (9th Cir. 977)."

The Opinion augments the unconstitutionality of the State Bar proceedings which admittedly barred the accused defending himself, presenting evidence, confronting his accusers, and cross-examining witnesses. As held in **Willner v. Committee on Character & Fitness** (1963) 373 U.S. 96; 83 S. Ct. 1175; 10 L. Ed. 2d 224, at 102 Willner v. Committee on Character & Fitness (1963) 373 U.S. 96; 83 S. Ct. 1175; 10 L. Ed. 2d 224, at 102, an attorney has a constitutional right to notice, to defend, to present evidence, to confront his accusers, and to cross-examine witnesses.

The Opinion admits that the prosecutor, who was not barred from presenting any evidence and who knew that the Review Department ruling held that the only issues precluded from being tried were those that had been determined in the civil law suit based on clear and convincing evidence, and none had been so determined, failed to carry the prosecution's required burden of proof of presenting clear and convincing evidence of any act of moral turpitude and any business transaction violation. This requires that the Opinion issue an order exonerating the accused of those charges. The prosecution had no constraints. It failed. The attorney is entitled to a judgment finding that he is exonerated of the moral turpitude and business transaction charges as a matter of law. Prosecutors are not entitled to retrials of their cases when they are fail to carry their required burden of proof. The Opinion admits that the attorney is entitled to an order of exoneration of the moral turpitude and business transaction charges. It states that, " OCTC did not present any references to the record or analysis showing where and how each element of the charged violations were found by the jury in the James lawsuit by clear and convincing evidence." Opn. 7, para. 2, 13-19. The accused in such cases is entitled as a matter of law to an order exonerating him of the charges. Refer prior discussion and **Ruffalo.**

The Opinion admits that the accused was denied his constitutional rights to appear, to defend, to confront and to cross-examine witnesses. It states that it agrees that the hearing judge erred in relying upon the evidentiary record to make findings about the nature and extent of the former 3-300 and section 6106 violations and various aggravating circumstances without giving respondent an opportunity to attempt to contradict, temper, or explain the evidence in that civil record. Opn. 4:para. 1, 3-7. It agrees that the hearing judge denied the accused his constitutional rights to cross-examine witnesses. It agrees that hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial and in precluding respondent from fully presenting his mitigating evidence.Opn. 4; para 1, 8-12 4: para 2, 13-19 At this point, the Opinion was required to find the attorney innocent of the moral turpitude and business transaction charges. **Ruffalo.**

Instead of entering the required order exonerating the accused of the moral turpitude and business transaction charges, the Opinion augments the unconstitutionality of the proceeding by claiming, with no notice nor law in support of such a novel claim, that its reading of one special verdict consisting of the punitive damage award in a civil lawsuit is conclusively an act of moral turpitude. It does so with no opportunity for the attorney to have notice of such a novel claim. It does so with no opportunity for the accused to refute, cite law, present evidence and briefs that such a claim is unconstitutional *per se* and is absurd, irrational, incompetent, and a denial of not only due process of law but the required equal protection of the law. This denies to the accused not only his constitutional rights to notice and a trial, but his constitutional right to be heard on appeal.

Section 6085 provides that "Any person complained against shall be given reasonable notice and have a reasonable opportunity and right: (a) To defend against the charge by the introduction of evidence, ...(c) to examine and cross-examine witnesses." "But a 'full hearing'-a fair and open hearing-requires more than that... Those who are brought into contest "The requirements of fairness are not exhausted in the taking and consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." **Morgan v. United States** 304 U.S. 1, at 20.

An attorney is entitled to sufficient time to prepare and defend and fair notice of the facts relied on in support of a claim, so he may prepare and defend. **In re: Gault** 387 U.S. 31, 34, 18 L. Ed.2d. 527, 87 S. Ct. 1428 (1967) **In re: Gault** 387 U.S. 31, 34, 18 L. Ed.2d. 527, 87 S. Ct. 1428 (1967) **In re: Gault** 387 U.S. 31, 34, 18 L. Ed.2d. 527, 87 S. Ct. 1428 (1967).In re: Gault 387 U.S. 31, 34, 18 L. Ed.2d. 527, 87 S. Ct. 1428 (1967). Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are in fact. See **In re Gault, supra,** at 33-34, and n. 54 (1967). Procedural due process rules were meant to protect persons not from a deprivation, but from the mistaken or unjustified deprivation. **Carey v. Piphus** 435 U.S. 247, 259, 98 S. Ct. 1042, 1050, 55 L.Ed.2d. 252 (1978) **Carey v. Piphus** 435 U.S. 247, 259, 98 S. Ct. 1042, 1050, 55 L.Ed.2d. 252 (1978)Carey v. Piphus 435 U.S. 247, 259, 98 S. Ct. 1042, 1050, 55 L.Ed.2d. 252 (1978). Thus, they impose constraints on government action. **Mathews v. Eldridge** 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L.Ed. 2d. 18

(1976)**Mathews v. Eldridge** 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L.Ed. 2d. 18 (1976). Mathews v. Eldridge 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L.Ed. 2d. 18 (1976). In operation, due process requires notice of the cause or causes in sufficient detail and sufficient time to fairly enable a party to show any error that may exist, the right to be advised of the names and the nature of the violation alleged, the right to a meaningful opportunity to be heard in his own defense, and a hearing before a tribunal that both possesses some academic expertise and has an apparent impartiality towards the claims. **Pickering v. Board of Education** 391 U.S. 563, 578 n.2, 88 S. Ct. 1731, 1739 n.2, 20 L. Ed.2d. 811 (1968) **Pickering v. Board of Education** 391 U.S. 563, 578 n.2, 88 S. Ct. 1731, 1739 n.2, 20 L. Ed.2d. 811 (1968Pickering v. Board of Education 391 U.S. 563, 578 n.2, 88 S. Ct. 1731, 1739 n.2, 20 L. Ed.2d. 811 (1968). See also **Goss v. Lopez** 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d. 725 (1975)**Goss v. Lopez** 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d. 725 (1975).Goss v. Lopez 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d. 725 (1975).

An accused must be given written notice informing him of the specific issues that he must meet, at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. **In re: Gault, supra,** at 31-34.

"Proceeding which deny notice or hearing, or provide inadequate methods, are lacking in due process." See **Morgan v. United States** (1936) 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288; 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129; **Ohio Bell Tel. Co. C v. Public Util. Com**. (1939) 301 U.S. 292, 57 S. Ct. 724, 728, 81 L. Ed. 1093, 1099. At a minimum, an attorney subject to discipline is entitled to procedural due process of law, including notice and an opportunity to be heard. See **In re Ruffalo** 390 U.S. 544, 550, 88 S. Ct. 1222, 1225, 20 L. Ed. 117 (1968). As held by the United States Supreme Court in **Sanders v. Shaw** 244 U.S. 317 (1917), a court which renders a judgment without affording an opportunity to introduce evidence constitutes a denial of due process of law. As held in **Schware v. Board of Bar Examiners**, 353 U.S. 232, 238-239Schware v. Board of Bar Examiners 353 U.S. 232, 238-239, "An attorney may not be excluded from the practice of law in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

The Opinion on Review's assertion that it conclusively finds culpability of an act of moral turpitude by reading one jury verdict concerning punitive damages in a civil law suit reduces the proceeding to one devoid of any due process of law. At every stage, the accused was denied notice of the issues and facts which he was required to meet, to present any information or briefs or law or evidence, and to have findings based on facts, which admittedly the Opinion states are absent, and to have conclusions of law based on law and on proven and citable facts, which the Opinion admits it lacks.

The Opinion's claims that an accused has no rights to confrontation or confrontation, but to temper evidence has no support in any law. Opn. 13, para. 1, 16-26 Its claims that a hearing judge may read a transcript and determine credibility of witnesses is not only unsupported by any authority, but it is irrational to claim a person may read a piece of paper containing the words of a person and determine if that piece of paper is credible. Opn. 12, para. 2, 13-19

Based on the multiple constitutional violations by the Hearing Department and the Review Department of the State Bar's Court in proceeding with out notice, without a meaningful opportunity to be heard in a meaningful manner, without any rights to evidence, to confrontation, to cross-examination, and the right to findings of fact and conclusions of law based on the law and the facts, the right to notice of and the right to be heard on appeal and to have notice of any new claims and any new proposed changes to existing law and an opportunity to present the law concerning the constitutionality of such proposed new law changes, the remedy for these abuses is to issue the required order exonerating the attorney of the moral turpitude and the business transaction charges and to withdraw the defective Opinion that admits it is violating the constitutional rights of the accused in its findings and conclusions of law.

III.

Preventing an Accused in a Quasi-Criminal Proceeding Defending Himself by Applying Collateral Estoppel to a Civil Suit is Unconstitutional

The Opinion is required to be reconsidered as it violates the Supremacy Clause of the United States Constitution and due process of law in that it contains unheard of claims of collateral estoppel which have been rejected by the United States Supreme Court to which the adjudicators in this proceeding must defer. Simply stated, the United States Supreme Court has held that it is an error of constitutional law to bar defense by asserting the application of collateral estoppel in proceedings similar to this one.

A. Identical Issue, Not Commonality, Is the Criteria

The issues that may be given preclusive effect from one proceeding to another are not those which are in "common," as claimed in the Opinion. Opn. 14, para 2, 22-25.[7] Thus, the Opinion's claim that, "We must first determine if there are any issues that are common to the James' lawsuit and the present disciplinary proceeding." Opn. 14, para 2, 22-25. The Opinion's language is not only an incorrect statement of the law, but it is grammatically improper. Grammatik in Word for Windows 98 picked up that the possessive denomination in James is missing in the sentence as it is missing in all of the Opinion Grammatik picked up the following grammatical errors in this sentence: "the phrase containing determine appears to be badly constructed. Check for missing words or a word that is the wrong part of speech."

The Word for Windows 98 Thesaurus indicates that synonyms for the word "common" which is a word never used by any Courts in considering the application of collateral estoppel, are "customary," "familiar," "ordinary," regular" and defines "common" as an adjective to mean "relating to the community as a whole," or "commonly encountered," or "common to or shared by both or all of two or more parties," or "of ordinary or inferior quality or value,""lacking refinement or taste," "or of or associated with the great masses of people."

---

[7] The Opinion asserts at 14, para 2, 25-26, then "Then [we] determine whether [the issues that are common] were previously adjudicated...under the clear and convincing standard of proof and whether they are necessary to support the civil judgment." It then states at 15,1-5, that "Then we can give them preclusive effect and use them to find the corresponding element or elements of the charged disciplinary violations or alleged aggravating circumstances."

As held in **Grogan v. Garner** 498 U.S. 279 (1991), at 285, the United States Supreme Court has held that if the issue of fraud is tried based on a burden of proof of preponderance of the evidence, and "the clear and convincing standard applies [to the instant case]..., the prior judgment could not be given collateral estoppel effect." That disposes of this case and the unconstitutional application of collateral estoppel in this case.

For collateral estoppel to apply, the issue was must the same or identical, not one which may be in common as claimed in the Opinion. "The matter raised in the second suit must be identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." **Tait v. Western Md. R. Co.** 289 U. S. 620, 624, 707. The point of question must have been actually litigated and determined. **Cromwell v. County of Sac,** 94 U.S. 351, 352-353, quoted in **Partmar Corp. v. Paramount Corp.** 347 U.S. 89 (1954), at 91. Preclusion may only apply when the matters were actually presented and determined in the first proceeding. **U.S. v. International Building Co.** 345 U. S. 502 (1953), at 506. The issues must be those that were actually litigated and determined. **Lawlor v. National Screen Service** 349 U.S. 322 (1955). For preclusion to apply, it is limited to the determinations of fact, and mixed fact and law, that were essential to the decision. **Commissioner v. Sunnen** 333 U.S. 591, 601. Preclusion only applies when the first proceeding establishes one of the ultimate facts in the second proceeding. **Commissioner,** at 600. For preclusion to apply, the first proceeding must "necessarily resolve the issue" in the second. **One Lot Emerald Cut Stones v. United States** 409 U.S. 232 (1972). For preclusion to apply it only applies to an issue that is actually and necessarily determined. **Montana v. United States** 440 U. S. 147 (1979), at 153. Collateral estoppel only applies to a right, question or fact distinctly put in issue and directly determined in the first proceeding. **Southern Pacific R. Co. v. United States** 168 U.S. 1, 48-49 (1897)

The Opinion's claim that issues affecting great masses of people or that are ordinary in one proceeding preclude defense in another is irrational and contrary to well-established law.

In all events, it is undisputed that the Opinion states it can find no facts from the first proceeding that were necessarily put at issue in the second proceeding. This also means that no facts can be found concerning the charged offense of an act of moral turpitude which alleged that the attorney reasonably should have known the state of mind of the investor and disclosed material facts to her. Since the Opinion admits that the first proceeding yields no facts which could be subject to collateral estoppel, its conclusion is unconstitutional that collateral estoppel applies to the moral turpitude claim. It also admits that there are no identical or same issues. Its' claims that malice or oppression or fraud in a punitive damage award is the same as an act of moral turpitude is refuted by the case law the opinion cites, by common sense, by the over one hundred different and varying meanings to those terms.

B. The Purpose of Monetary Punishment in Punitive Damages Awards and the Purpose of Protection of the Public from Unfit Practitioners in Attorney Disciplinary Proceedings Preclude the Application of Collateral Estoppel

The Opinion omits the critical issue that collateral estoppel does not apply when the purposes of the two proceedings are different and distinct. Since there was no notice of any claim that a punitive damage issue in a civil case would be claimed to conclusively establish the merits of a quasi-criminal proceeding, the accused was foreclosed from his due process right to challenge the constitutionality of taking damages and claiming they establish merits and claiming that the purpose of civil law damages is the same as the purpose in an attorney disciplinary proceeding.

As stated in **Most v. State Bar** (1967) 67 Cal. 2d. 589, 595, fn. 5, the purpose of civil proceedings and State Bar proceedings is clearly not the same. **Most v. State Bar** (1967) 67 Cal. 2d. 589 The California Supreme Court held in **Bernstein v. Committee of Bar Examiners** (1968) 69 Cal. 2d. 90, at 101, "The findings in the civil action are not binding upon this court. (cf. **Lefner v. State Bar**, 64 Cal.2d 189, 192 [49 Cal. Rptr. 296, 410 P.2d 832]." The following cases of the California Supreme Court establish that civil findings are not binding in State Bar proceedings: **Maltaman v. State Bar** (1987) 43 Cal. 3d. 924, **Rosenthal v. State Bar** (1987) 43 Cal. 3d. 612, 634Rosenthal v. State Bar (1987) 43 Cal. 3d. 612, 634, **Mushrush v, State Bar** 17 Cal. 3d. At 489, fn. 1,, **Mushrush v, State Bar** 17 Cal. 3d. At 489, fn. 1, **Yokozeki v. State Bar** 11 Cal. 3d. At 444**Yokozeki v. State Bar** 11 Cal. 3d. At 444, **In re Wright** (1973) 10 Cal. 3d. 374, 377;**In re Wright** (1973) 10 Cal. 3d. 374, 377, **Lee v. State Bar** (1970) 2 Cal. 3d. 927,**Lee v. State Bar** (1970) 2 Cal. 3d. 927, 941, **Bernstein v Committee of Bar Examiners** (1968) 69 Cal. 2d. 90, 101 **Bernstein v. Committee of Bar Examiners** (1968) 69 Cal. 2d. 90, **Lefner v. State Bar** (1966) 64 Cal. 2d. 189Lefner v. State Bar (1966) 64 Cal. 2d. 189, 192, **Magee v. State Bar** (1962) 58 Cal. 2d. 423, 429. **Magee v. State Bar** (1962) 58 Cal. 2d. 423, 429. The issues are not the same nor are the parties to the proceedings.[8]

In determining that collateral estoppel does not apply in State Bar proceedings to preclude the accused attorney defending his license to practice law based on civil law findings, the California Supreme Court analyzed the disparity and differences in the two proceedings and why collateral estoppel should not be applied in an attorney disciplinary proceeding in **Maltaman, supra**, at 947, as follows: “The State Bar Court noted the civil determination that petitioner committed fraud and undue influence in the Spang case, but the civil verdict and judgment have no disciplinary significance apart from the underlying facts.....`[S]substantial evidence' to support the civil judgment is not necessarily `convincing proof . . . to a reasonable certainty,' which we must find in order to impose discipline.”

---

[8] As stated by the State Supreme Court in **Gikas v. Zolin** 6 Cal. 4th 841; 863 P.2d 745; 25 Cal. Rptr. 2d 500 (1993), at 848, "In general, collateral estoppel precludes a party from relitigating issues litigated and decided in a prior proceeding. (**People v. Sims** (1982) 32 Cal.3d 468, 477 [186 Cal. Rptr. 77, 651 P.2d 321]; **Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.** (1962) 58 Cal.2d 601, 604 [25 Cal. Rptr. 559, 375 P.2d 439])... Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (**Lucido v. Superior Court** (1990) 51 Cal.3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223, 2 A. L. R. 5th 995].) Even if these threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles. (at p. 339)." The issues are diametrically different and not, as required the same issue. The civil case was tried based on a claim to the unwisdom of an investment for an investor who was a stranger to the attorney. It did not concern a business transaction ethical rule concerning an attorney entering into a business transaction with an existing client. There was no mention of such a rule or an issue, yet that comprises counts one, two, and four in their entirety of the instant notice and proceeding. There also was no mention of moral turpitude, which comprises all of count three.

The purpose of an attorney disciplinary proceeding is to determine whether an attorney has violated rules of professional conduct and whether he should be sanctioned concerning his right to work as a result thereof in order to protect the public from an unfit practitioner. The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (**Chadwick v. State Bar** (1989) 49 Cal 3d 103, 111(**Chadwick v. State Bar** (1989) 49 Cal 3d 103, 111; **Cooper v. State Bar** (1987) 43 Cal 3d 1016, 1025; standard 1.3)Cooper v. State Bar (1987) 43 Cal 3d 1016, 1025; standard 1.3). While the purpose of attorney disciplinary proceedings is not to punish the attorney, the purpose of punitive damages is exactly the opposite , to wit, to punish the defendant. The United States Supreme Court has held that punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." **Gertz v. Robert Welch, Inc**., 418 U.S. 323, 350 (1974), **Electrical Workers v. Fount** 442 U.S. 42 (1979). Since the purpose of the punitive damage award in a civil proceeding upon which the Opinion asserts it finds conclusively, without a trial or hearing, an act of moral turpitude, is exactly the opposite of the purpose of the attorney disciplinary proceedings and the finding of an act of moral turpitude, the claim of collateral estoppel is unconstitutional as the purpose behind the two issues is exactly the opposite of each other.

It goes without saying that a claim that a damage award is the merits of another proceeding not only has no support in the law, it is contrary to the principles of notice and opportunity to appear and defend. Parties prepare and litigate merits. They do not prepare to try and contest damages which is a collateral and not the merits issue with the same degree of attention, care, or diligence, especially since punitive damages is considered discretionary and without sufficient legal safeguards and criteria to know, in advance, how to prepare and defend. It is therefore unfair to a litigant to apply collateral estoppel to a damage issue in a civil proceeding and claim it conclusively establishes the merits of professional misconduct by an attorney in a quasi-criminal proceeding wherein the right to work is at issue. The requirement of identical issue is violated by the Opinion's claim that damages issues are the merits of another proceeding. **Tait v. Western Md. R. Co.** 289 U. S. 620, 624, 707.

C. The Evidentiary Standard that Requires that "All Intendments in Favor of the Accused Attorney" Precludes a Civil Law Damage Verdict Collaterally Estopping an Accused's Defense to the Merits Of a Quasi-Criminal Attorney Proceeding

The Opinion errs, as a matter of law, in claiming that the attorney asserts no specific unfairness in the application of collateral estoppel, in claiming that the civil punitive damage verdict was tried on the same burden of proof as required in the State Bar proceeding, and in asserting that a common issue permits the application of collateral estoppel. It also errs as a matter of law in citing and relying on its own opinions which are constitutionally and by Rule of Court prohibited to be cited by any party or tribunal. Opn. 11, para 1, 4-26, 12-14, 18,20,22.[9]

---

[9] Pursuant to **Article 6, section 14** Article 6, section 14Article 6, section 14 of the California Constitution, "The legislature shall provide for the prompt publication of such opinions of the Supreme Court and Courts of Appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Pursuant to California Rules of Court, Rule 977**Rule 977** Rule 977 which states "[Unpublished opinions] An opinion that is not ordered published [by the California Supreme Court] shall not be cited or relied on by a court or a party in any other action or proceeding... (with exceptions not applicable)." The Opinion's reliance on cases involving Applicant A, and Attorneys Berg, Stewart, Acuna, Stewart, Wright , and Rubens is prohibited. Such cases are not permitted under the State Constitution to be published and the Rule of Court prohibits this party and this tribunal from citing or relying on them. It appears to be both judicial misconduct as a "refusal to follow the law" and disbarable misconduct as "an artifice, fraud, and deceit, " to cite or rely on such cases. As such, the attorney deems that he is precluded from doing so. No local standard of the State Bar may stand as it is superseded by the California Constitution and by the express provision of the California Rules of Court prohibiting such citation and reliance.

It would deny to the Petitioner the equal protection of State Law and the due process of law to decline to follow the law prohibiting citation or reliance on non-citable cases. As held in **Connolly v. Union Sewer Pipe Co**.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431**Connolly v. Union Sewer Pipe Co**.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431**Connolly v. Union Sewer Pipe Co**.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431Connolly v. Union Sewer Pipe Co.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431, no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, and property, and in

The Opinion fails to address the fact that it is an error of law to conclusively find an act of moral turpitude in an attorney disciplinary proceeding based solely on reading a jury verdict on punitive damages in a civil case when the two issues have different burdens of proof. Opinion at 11, para. 1, 5-14, 16: 1-15.

It is not correct to claim that a civil punitive damage burden of proof of clear and convincing evidence is the same burden of proof in an attorney disciplinary proceeding. It is not. The burdens of proofs which were not addressed in the Opinion are different. Thus, in an attorney disciplinary proceeding, unlike the punitive damage instruction in a civil proceeding, there must be "convincing proof to a reasonable certainty and any reasonable doubts must be resolved in favor of the accused." (**Himmel v. State Bar** (1971) 4 Cal.3d 786, 794, 94 Cal Rptr. 825, 484 P.2d 993; **Zitney v. State Bar** (1966) 64 Cal. 2d 787, 789-790, 51 Cal.Rptr. 825, 415 P.2d 521.) "[R]reasonable doubts must be resolved in favor of the

---

pursuit of happiness. Reliance on and citation of non-citable cases, when the State Bar and its Court are advisory only, offends the precepts of law prohibiting pre-adjudication publications which prejudge the merits, in addition to being a direct, willful, intentional, and flagrant violation of the Constitutions of the State and of the United **Sheppard v. Maxwell**, 384 U.S. 333, 86 S.Ct. 1507. States. **Sheppard v. Maxwell**, 384 U.S. 333, 86 S.Ct. 1507. **Sheppard v. Maxwell**, 384 U.S. 333, 86 S.Ct. 1507Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507. In addition, it denies to the Petitioner his due process and equal protection rights under the fourteenth amendment to a "meaningful opportunity to be heard in a meaningful manner" as required under **Armstrong v. Manzo** 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d. 62 (1965) **Armstrong v. Manzo** 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d. 62 (1965)Armstrong v. Manzo 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d. 62 (1965).

attorney. **Price v. State Bar** (1982) 30 Cal 3d 537, 547" **Price v. State Bar** (1982) 30 Cal 3d 537, 547; **Emslie v. State Bar** (1974) 11 Cal 3d 210, 226Emslie v. State Bar (1974) 11 Cal 3d 210, 226. All reasonable doubts are to be resolved in favor of the attorney. (**Alberton v. State Bar** (1984) 37 Cal.3d 1, 11-12 [206 Cal.Rptr. 373, 686 P.2d 1177, A.L.R.4th 1487].)

"[A]ll reasonable doubts in favor of the accused [must be made] and if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted." (**Lee v. State Bar, supra**, 2 Cal.3d at p. 939; see also **Zitny v. State Bar** (1966) 64 Cal.2d 787, 790; cf. **Lubetzky v. State Bar, supra**, 54 Cal.3d at p.318). Where the respondent's version is plausible, even when controverted, it supports a reasonable inference of lack of misconduct. (**Davison v. State Bar, supra,** 17 Cal.3d at pp. 573-574.)

Due to the different burdens of proof, the application of collateral estoppel to a jury verdict on punitive damages which did not instruct the jury that all reasonable doubts must be resolved in favor of the attorney; that if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence of the attorney rather than one leading to a conclusion of guilt must be accepted; and which required that the jury consider that where the respondent's version is plausible, even when controverted, it supports a reasonable inference of lack of misconduct," is an error of law and unconstitutional as the Opinion admits that the burdens of proof must be identical and they admittedly were and are not.

IV.

The State Bar Judges are Disqualified Due to Interest in the Outcome

Leaving aside the Opinion's errors of fact and law concerning the citation to the record, its reliance on uncitable cases, and its unsubstantiated claim that the costs it assesses for its private party employer are *de minimus*, its conclusion of law is an error of law. Opn. 21-23.

The denial of a fair and impartial adjudicator as evidenced by this rushed proceeding whizzing through guilty findings without notice, trial, defense, hearing, witnesses, application of and attendance to facts or law, is a constitutional violation that is always preserved ad is mandatory. Denying trials, appeals, evidence, and law to get money for oneself is a significant factor in adjudicators making erroneous legal conclusions of culpability.

The United States Constitution does not permit an adjudicator to be paid and have his housing, staff, facilities, and resources paid by a private party which financially benefits itself by having its financial beneficiaries make findings of culpability. The Opinion admits finding attorneys guilty and imposing claimed administrative costs is one of the sources of financing and payment of the adjudicators in this case. That is sufficient to find that this proceeding has denied to the accused at every stage a fair and impartial adjudicator as the amount of money is not relevant as it is the fact of subservience to the financial needs of a party by a judge which renders him incapable of being fair, impartial and maintaining the appearance of propriety required of a judicial officer sworn to uphold the Constitution of the United States. **Augustus v. Roemer** 771 F. Supp. 1458 (E.D. La. 1991), **Tumey v. Ohio** 273

U.S. 510, 523, 47 S. Ct. 437 273 U.S. at 534, 47 S. Ct. at 445**Tumey v. Ohio** 273 U.S. 510, 523, 47 S. Ct. 437 273 U.S. at 534, 47 S. Ct. at 445 (1955)'**Tumey v. Ohio** 273 U.S. 510, 523, 47 S. Ct. 437 273 U.S. at 534, 47 S. Ct. at 445 (1955), and **Aetna Life Insurance v. La Voie** 475 U.S. 813, at 825, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986).

V. Conclusion

The Opinion is required to be considered so as to enter an order exonerating the attorney of the charges of the act of moral turpitude and a business transaction violation due to insufficiency of the evidence.

Reconsideration is also required to correct the errors of law in applying collateral estoppel, in making evidentiary conclusions, in failing to address the vagueness and over breadth doctrines as set forth by the United States Supreme Court, in failing to address the fairness of the adjudicator issue as set forth in the controlling decisions from the United States Supreme Court, and in failing to present in the Opinion the critical facts of the nine to three jury verdict on the fraud merits of the civil action which were determined by a preponderance of the evidence.

RESPECTFULLY SUBMITTED,

Dated: November 14, 2000

B. BRUCE KITTRELL,
Respondent Attorney ***Pro Se***

REVIEW DEPARTMENT OF THE STATE BAR COURT IN BANK[1]

In the Matter of) Case No. 95-0-14321
)
BOLDEN BRUCE KITTRELL,) ORDER
No. 40896)
)
A Member of the State Bar)
______________________________)

The State Bar's motion for late filing is granted. The motions to reconsider filed by the State Bar and by respondent Bolden Kittrell are denied, no new or different facts, circumstances or law having been shown. The motions to "de-publish" the opinion on review, filed by the State Bar and by respondent, are denied, no good cause having been shown.

____
James W. Obrien
Presiding Judge

---

[1] Watai, J. did not participate

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
CHARLES WEINSTEIN, No. 138554
1149 South Hill Street
Los Angeles, California 90015-2299
Telephone: (213) 765-1000

THE STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
HEARING DEPARTMENT-LOS ANGELES

In the Matter of	)	Case No. 95-0-14389
	)	
BOLDEN BRUCE KITTRELL,	)	OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION
No. 40896	)	
A Member of the State Bar	)	
	)	

I. INTRODUCTION

The State Bar of California opposes Respondent's Motion for Reconsideration ("Respondent's Motion"), filed on November 15, 2000, because it does not present any new meritorious issues of fact or law. Although Respondent purports to raise 45 "new errors of law and of fact" (Respondent' Motion, p. 4-9) and 11 "constitutional rights of an accused in a quasi-criminal proceeding . . .which are violated by the Opinion on Review" (*id.*, pp, 10-11), this hodgepodge of claims can meaningfully be reduced to two themes:

(1) Respondent's lack of respect for the Review Department – similar to his attacks on the Hearing Department and the State Bar in earlier pleadings – as demonstrated by his repeated insinuations that this Court was not just wrong, but fundamentally lacked integrity, in arriving at its finding and conclusions.

(2) Respondent's conduct towards Mrs. James is not disciplinable because Justice Jackson's dissenting opinion in *Jordan v. De George* (1951) 341 U.S. 223, established binding precedent on the State Bar Court, mandating that Business and Professions Code section 6106 be struck as unconstitutional.

II. RESPONDENT REPEATEDLY DEMONSTRATES HIS LACK OF RESPECT FOR THIS COURT.

The sheer obtuseness of Respondent's Motion demonstrates his lack of respect for this Court – it is difficult to separate what Respondent claims are the actual issues from rhetorical flourishes and the flotsam and jetsam of his past briefs. For example, Respondent's "Declaration in Support of Motion for Reconsideration. . ." ("Resp.'s Decl. Re Mot/Recon") concludes, "I respectfully request that the record be augmented to include the above facts as set forth in Exhibit A. . . ." (there I no Exhibit A attached to Respondent's Motion for Reconsideration.) In addition, Respondent's Declaration contains un-cross-examined testimony largely unrelated to any "issues raised on reconsideration.

Further, some of Respondent's assertions are self-contradictory: "the Client Security Fund without notice or a hearing to me, and over my written objections, paid [Mrs. James] $30,000." (Resp.'s Decl. Re Mot/Recon, p.4.) Another statement is blatantly false – "I have no complaints against me in thirty-four years" (*id.*, p.1) – is repeated even though Respondent was recently reminded of its untruthfulness. (See "State Bar's Response. . . to Respondent's Motion to Augment," p.2, fn.1 (and the three letters attached thereto, written by Respondent which acknowledged and responded to various State Bar complaints against him).)

Respondent shows his lack of respect for this Court by repeatedly claiming in his "Points and Authorities" that the Opinion "admits" that the Court is committing various transgressions. For example, Respondent states: "the Opinion on Review asserts that it finds culpability of an act of moral turpitude while admitting it has no facts to support said conclusion." (Respondent's Motion, p.2.) In nearly every instance where Respondent attributes an act of "admitting" by the Court he is doubly wrong: First, the Court does not make the claimed admission. Second, what Respondent claims the Court is admitting is different from (or even the opposite of) what the Court stated: moreover, in Respondent's formulation, the purported admission often would be contrary to law.

For example, Respondent claims "the Opinion admits that it is required to enter an exoneration of the attorney on [the moral turpitude and business transaction charges]." (*Id.*) Respondent also claims that"[I]t is an error law to assert that an act of moral turpitude applies to conduct concerning a separate business transaction unrelated to the practice of law." (*Id.*,p.7.) Yet, Respondent fails to address the Court's succinct summary of the law disproving

Respondent's contention, and the California Supreme Court cases cited therein. (Opinion, p.17.)

Another example of Respondent's lack of respect for this Court is his untrue claim that the Opinion's citation to *Lipson v. State Bar* (1991) 53 Cal.4d 1010, 1020 (Opinion, p. 17) "is a false citation." (Respondent's Motion, p.29.) Even a cursory review of page 1020 of *Lipson* shows that the proposition referred to by the Review Department – "even an attorney's non-deliberate breach of a fiduciary duty to a client involves moral turpitude if the breach occurred as result of the attorney's gross carelessness and negligence" – is fully supported, and in considerable detail.[1] Despite the fact that virtually the entire page 1020 of *Lipson* relates to this Court's statement, Respondent concludes: "There are no such statements, claims, or suggestions in the *Lipson* decision." (Respondent's Motion, p.29.) Respondent seems to object to the Court's citation to *Lipson* because that case does not involve precisely the same set of facts. Apparently, for

---

[1] Among the passages in Lipsonat page 1020 supporting the statement in the Review Department's opinion are:

(1) "Although attorneys cannot be held accountable for every detail of office operations, where fiduciary violation occur as the result of serious and inexcusable lapses in office procedure, [such violation] may be deemed 'wilful' for disciplinary purposes, even if there was no deliberate wrongdoing."

(2) "The review department concluded that by willfully misappropriating his client's funds, petitioner committed an act of moral turpitude and thereby violated section 6106. . . .This finding alone supports an act of moral turpitude, and thereby the violation of section 6106."

(3) "The lack of evil intent will not immunize an attorney from a conclusion of moral turpitude when the attorney's actions constitute gross carelessness and negligence violating the fiduciary duty to a client." (*Lipson, supra,* 51 Cal.3d at 1020 (internal quotations omitted).)

Respondent, the Review Department is only permitted to cite cases in which the facts and the law are identical to that in his case and which are not somehow "constitutionally and legally precluded opinions." (See Respondent's Motion, p.9 (43rd error).)

Respondent also states: "Due process of law does not permit this Court to make up new charges at the appellate level and make a finding of culpability based on its newly created and unnoticed charge while refusing to exonerate an accused on a charge it admits has no evidence to support it." (Resp.'s Motion, p.16.) The Notice of Disciplinary Charges, however, provided more than sufficient notice to Respondent, especially in that 3 ½ pages of background allegations were incorporated by reference into the moral turpitude charge.[2]

III. RESPONDENT HAS NOT RAISED ANY MEANINGFUL ARGUMENT TO SUPPORT HIS ATTACK ON THE CONSTITUTIONALITY OF SECTION 6106.

Respondent has presented a plethora of arguments concerning moral turpitude, many continuing his theme of lack of respect or even contempt for this Court. All are completely without merit. Respondent's alleged error number 3 contends that this Court found an act of moral turpitude "in vindictive retaliation against the attorney for his presenting the constitutional issues concerning the financial interest of the procedures, court, and judgeships of the privately financed and run State Bar Court of the State Bar of California." (Resp.'s Motion, p.4.) The Opinion fully dispenses with Respondent's arguments.[3] (Opinion, pp.21-23.)

---

[2] On March 24, 1998, Respondent filed a Motion to Dismiss for Failure to State a Disciplinable offense, in the Hearing Department. The Motion denied on April 9, 1998.

Respondent then argues (alleged error number 5) tht the United States Supreme Court requires that the term "act of moral turpitude" be applied to solely cases involving fraud and a specific intent to defraud." (Resp.'s Motion, p.5.) (Presumably crimes such as murder and theft are to be excluded.) Immediately thereafter, Respondent goes further and claims "[i]t is an error of law to assert that act of moral turpitude is not unconstitutionally vague." (*Id.*) Respondent also claims the Court "fails to state any of the controlling law from the United States Supreme Court" supposedly establishing that proposition. (*Id.*, p.24) Yet, these cases – which Respondent argues supersede *In re Kelley* (1990) 52 Cal.3d 487 – do not support his conclusion.

As he has done in previous briefs, Respondent incorrectly relies on *Jordan v. De George* (1951) 341 U.S. 223. (See, e.g. Resp.'s Motion, pp. 31-32, 37-38.) Respondent suggests that the majority holding can be ignored because:

> It is probable that the United States Supreme Court, since the American Bar Association has declared the term "act of moral turpitude" too vauge to be enforceable as a rule of professional conduct for attorneys that the reasoning of the dissent in *Jordan*, at 235 must be applied to declare the California statute

---

[3] To the extent that Respondent is raising a more global attack on the legitimacy and constitutionality of the State Bar Court, Respondent is ignoring recent California Supreme Court, reference to the contrary. (See, e.g., *In re Attorney Discipline System* 19 Cal.4th 582, 625 ("California has had ample reason during the past ten years to take pride in an attorney discipline system that has been recognized as one of our nation's finest.").)

> prohibiting an act of moral turpitude unconstitutional for over breadth and vagueness.

(Resp's Motion, p.37.) Respondent includes no citation to the purported ABA declaration. *Jordan* unambiguously concludes: "the phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." (*Jordan, supra*, 341 U.s. at 233; *accord, Hallinan* (1954) 43 Cal.2d 243,247.) Moreover, "[t]he phrase 'crime involving moral turpitude' presents no greater uncertainty or difficulty than language found in many other statutes repeatedly sanctioned by the Court." (*Jordan, supra*, 341 U.S. at 232, fn.15.)

Respondent's effort to discredit the Court's legal conclusion that his conduct involved moral turpitude by means of *reductio ad absurdum* itself reaches absurd lengths. Running amok for several pages with a word processor thesaurus (Resp.'s Motion, pp. 18-20), Respondent concludes that the Court's Opinion stands for the proposition that "if the act can be claimed to be 'yucky" . . . [it] is conclusively an act of moral turpitude." (*Id.*, p.20.)

IV. CONCLUSION:

Respondent has raised a series of shotgun, overlapping arguments, essentially dismissing the legitimacy of both this Court and the California Supreme Court. Although the State Bar has not addressed in detail many of these arguments (to the extent they are discernable), the State Bar contends that most have no relevance and none has any merit. However, if it would be of assistance to the Court, the State Bar will provide additional briefing on the constitutional or other issues.

For the foregoing reasons, Respondent's Motion should be denied in its entirety.

Respectfully submitted,

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL
COUNSEL

Dated: December 5, 2000

BY:____________________
Charles Weinstein
Deputy Trial Counsel

B. BRUCE KITTRELL
A Professional Corporation
Suite 201
Airport Office Plaza
25200 Crenshaw Boulevard
Torrance, CA 90505

(310) 891-1190

Appellant Attorney ***Pro Se***

THE SUPREME COURT OF THE

STATE OF CALIFORNIA

In the Matter of) Docket No. SO94082
) State Bar Case No
) .95-0-14321
)
BOLDEN B. KITTRELL) **REPLY TO MEMO-**
) **RANDUM RESPONSE**
)
) State Bar Rules of
) Procedure Rule 952(c)
)
)
No. 40896)
A Member of the State Bar)
)
)
)

I.

Introduction

This is reply to the memorandum response of the State Bar to the Petition for interlocutory review and request for certification of issues for the United States Supreme Court. The Petition for Review was filed pursuant to California Rules of Court Rule 952(c) to review a published opinion authored by a non-lawyer of the Review Department of the State Bar Court of the State Bar of California. The Petition for Review is hereinafter referred to as PR. The Memorandum Response is hereinafter referred to as MR.

The Memorandum Response must be struck and sanctions be imposed for failure to adhere to the most fundamental rule of appellate practice-citation to the record. There are none. None of the claimed facts are accurate. None of the claims are accurate. Pages one through eight must be removed and the fourteen page brief struck as there is no accuracy of any kind in any of the claimed and uncitable facts. With no citation to any record, the only remedy is to strike the brief, impose sanctions, and default the State Bar for its violation of the rules of appellate practice and the rules of professional conduct[1]

---

[1] It is a rule of appellate practice that a party who submits an appellate brief without citation to the record must be punished by having the brief struck, and when the defalcations are repetitive and serious, the party's default must be entered. This is such a case. In the United States courts, a party must designate to the other party those portions of the record to be cited in advance of filing a brief. After designation of the exact title of the document and the page and lines of a claimed fact to each other, a party may not submit a brief which contains a designation which has not previously been disclosed to the other party. Federal Rules of Appellate Procedure, hereinafter referred to as FRAP Rule 30(b). A statement of facts in an appellate brief must contain "appropriate references to the record." FRAP Rule 28 (a) (4). References to the record must contain the page, paragraph, or numbered

---

lines at which a fact appears. References must recite accurately exactly what the record states. FRAP rule 28 (e). In the state courts, an appellate brief must comply with the rule that, "The statement of any matter in the record shall be supported by appropriate reference to the record." California Rules of Court, Rule 15(a). "When a brief fails to comply with the requirements of these rules the reviewing court, on application of any party or on its own motion, and with or without notice as it may determine, may (1) order the brief to be returned to counsel for correction or interlineation, cancellation, revision, or replacement in whole or in part, and to be redeposited with the clerk within a time specified in the order (2) order the brief stricken from the files, with leave to file a new brief within a specified time, or (3) disregard defects and consider the brief as if properly prepared." California Rules of Court, Rule 18.

As held on May 1, 2000 abuses so violative of all of the rules of conduct, of practice, and of procedure require striking of the State Bar brief and personal monetary sanctions against counsel. **Han Giok Han v. Stanford University** 2000 Daily Journal D.A.R. 4511 (Ninth Circuit 2000). The court pointed out that in **Mitchel v. General Electric Co.**, 689 F.2nd. 877 (9th Cir. 1982), "On appeal, Mitchel filed a brief that 'contained allegation after allegation, all of which were unsubstantiated' by appropriate references to the record.... The court dismissed Mitchel's appeal for failure to comply with appellate rules that require a brief to cite those portions of the record that support his factual allegations. Id at 879. In that case, in his 'fourteen page brief, Mitchel refer[red] to the record below a single time.' Id, at 878. Here, in his fifteen page brief, Plaintiff makes no reference whatsover to the record below. There, rather than making specific references to the record, Mitchel simply told the court 'that [t]he depositions of [all witnesses deposed] are filled with instances in which Mr. Mitchel was treated differently than non-minorities.' " Id. Here, Plaintiff similarly makes general factual assertions without citing the record for support..... In **Mitchel,** the court informed counsel of the requirements of the appellate rules and gave him an opportunity to cure the defects, but he did not. See id. at 879. Here the appellee's brief cited Mitchel and requested dismissal of the appeal, yet Plaintiff did not take the opportunity to file a reply brief that could have cured the defects. Cf. **N\S Corp. v. Liberty Mut. Ins. Co.** 127 F.#d. 1145, 1146 (9th Cir. 1997) [dismissing an appeal where the defendant pointed out substantial defects in the plaintiff's opening brief and the plaintiff did not address

The issues are simple: May an appellate lay person change the noticed charge after the trial is concluded and find culpability of a charge never made and claim that the defendant is barred from defending himself by a conclusive finding of guilt of a charge never made and then remand to find the facts to support the guilt finding already made and publish its opinion state wide as if it were a court of law?

If necessary, the United States Supreme Court will be requested to follow its law as stated in **In Re Ruffalo** 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117 (1968) and order the exoneration of the attorney of the moral turpitude and business transaction charges and dismiss the proceeding and order the State Bar not to publish its opinions.

II.

The Admission that the Review Department Changed the Charge without Notice Requires an Order Exonerating the Accused

The State Bar has four arguments: the attorney misstates the opinion of the Review Department, (MR:8-9), Double Jeopardy does not apply (MR:9-11), the attorney has filed for review of the application of collateral estoppel already (MR:11-13, and publication of the Review

---

those defects in response, instead filing a reply brief containing additional defects. We dismiss the appeal because Plaintiff has 'exhibited complete disregard for the requirements' of the appellate rules respecting citation to the record. **Mitchel,** 689 F.2d. at 879; see also **Stevens v. Security Pac. Nat'l Bank,** 538 F. 2d. 1387, 1389 (9th Cir. 1976) ('Moreover, the appellant has filed briefs in this court which fail to comply with Fed. R. App. P. 28 (a)(1), (2), & (3). This ground alone would justify dismissal of the appeal.'). We reiterate our expectation that counsel make a good-faith attempt to comply with the rules of appellate procedure. Plaintiff's counsel failed to follow those rules and, although he was put on notice that his brief was noncompliant, he made no attempt to correct the glaring deficiencies in the brief."

Department opinion is authorized (MR:13-14). There is no argument that the Review Department did not change the moral turpitude charge after trial. It is undisputed that the Review Department changed the moral turpitude charge. The State Bar does not dispute that the charge was changed after completion of the trial without notice. The Review Department admittedly changed the moral turpitude charge from that which was noticed to a brand new one which was never noticed. This requires that an order issue exonerating the attorney of the moral turpitude charge. Refer PR:19-13.

III.

The Absence of Clear and Convincing Evidence of a Business Transaction with a Client Requires Exoneration of the Attorney of That Charge

There is no dispute that the prosecutor failed to prove by clear and convincing evidence any of the elements of a business transaction violation. The Review Department reversed and remanded for another trial on this issue as the prosecutor had failed to present evidence to support such a violation. There was no evidence of a client. There was no evidence of a lack of a fair transaction or a writing. There was no evidence of a failure to advise of the right to seek independent counsel or of a lack of opportunity to do so. This requires an order exonerating the attorney of that charge. PR:9-13.

IV.

Due Process and/or Double Jeopardy Preclude a Retrial

The State Bar cites old cases and not the new ones from the United States Supreme Court holding that a quasi-criminal proceeding, such as this one, has a right to the application of the prohibition on double jeopardy and successive prosecutions for the same offense. It is the new law that applies that prohibits the successive prosecution in this case and requires an order issue exonerating the attorney of the moral turpitude and business transaction charges. PR: 15-18.

V.

Collateral Estoppel Admittedly was Misapplied as the Issues were not Identical

The State Bar admits that the controlling criteria for application of collateral estoppel is that the issues must be identical. MR: 11. There is no dispute that the issues were not identical. This requires an order issuing stating that collateral estoppel was misapplied to find guilt of a charge never made based on the application of collateral estoppel to a damage issue in a civil proceeding to a merits issue in a quasi-criminal attorney disciplinary proceeding. PR: 41-42.

VI.

The State Bar's Publication of its Opinions is Admittedly Unconstitutional

The State Bar does not dispute that its publication of the opinion in this case violates the California Constitution, is a violation of the rule prohibiting the issuance of an advisory opinion, is a violation of the attorney's constitutional rights to privacy, denies the attorney the equal protection of the law guaranteed by the United States Constitution, and denies to this attorney his United States constitutional rights to a fair trial. Instead, it refers to its local and internal rule of practice which has no constitutional, statutory, or rule of court authorization. MR:13-14. Since the publication was admittedly unconstitutional, it is incumbent that the State Bar be ordered to withdraw said publication and to cease and desist in it unconstitutional practice of publishing said opinions as if they issued from a court of law.

VII
Conclusion

The State Bar's brief must be struck and its default entered. Sanctions should be imposed. The attorney is unable to respond to the response brief as it has no citations in any of its fourteen pages to any record. Its factual assertions are not only unsubstantiated, but they are false.

The admissions of the State Bar in its response indicate there is no contest that an order must issue exonerating the attorney of the moral turpitude and business transaction charges and the State Bar must be ordered to cease publication of its opinions.

RESPECTFULLY SUBMITTED,

Dated: January 29, 2001

B. BRUCE KITTRELL
Petitioner Attorney ***Pro Se***

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed Oct 26, 2000
State Bar Court
Clerk's Office
Los Angeles

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	Case No. 95-0-14321
	)	
BOLDEN BRUCE KITTRELL	)	OPINION ON REVIEW
	)	
A Member of the State Bar	)	
	)	

Both respondent Bolden Bruce Kittrell[1] (respondent) and the State Bar, represented by its Office of the Chief Trial Counsel (OCTC), seek review of a hearing judge's recommendation that respondent be suspended from the practice of law for five years, that the suspension be stayed, and that respondent be placed on probation for four years on conditions including that respondent be actually suspended for three years and until he establishes his rehabilitation, present fitness to practice, and present learning in the law. The hearing judge's discipline recommendation is based upon his findings that, with respect to a business transaction with a 59-year-old woman of limited means, respondent committed three violations of the former Rules of Professional Conduct of the State Bar that were effective from May 27, 1989 through September 13, 1992[2] and two violations of the Business and Professions Code.[3]

---

[1] Respondent was admitted to the practice of law in the State of California in December 1967 and has been a member of the State Bar since that time.

More specifically, the hearing judge found that, with respect to a business a transaction with Ms. Czarine Hope James (James), respondent committed two violations of former rule 3-300(A): first by entering into an unfair business transaction with James and second by entering into that transaction without disclosing the terms of the transaction to James in writing. The hearing judge also found that respondent violated former rule 3-300(B) by failing to inform James in writing that she could seek independent legal advice with respect to the transaction. Next, the hearing judge found that respondent violated section 6106 by engaging in acts of concealment and deception amounting to moral turpitude with respect to respondent's dealings with James. Finally, the hearing judge found that respondent violated section 6068, subdivision (o)(2) by failing to report, to the State Bar, the entry of a civil judgment against him for, among other things, fraud and breach of fiduciary duty with respect to the James business transaction.[4]

In making his findings that respondent violated former rule 3-300 and section 6106, the hearing judge applied principles of collateral estoppel to bind respondent to the adverse civil judgment that James obtained against respondent in the Orange County Superior Court after an eight-day jury trial (the James lawsuit). The hearing judge applied those principles to preclude respondent, in this disciplinary proceeding, from relitigating the jury's findings in the James lawsuit that respondent defrauded and breached his fiduciary duty to James. Moreover, in addition to applying principles of collateral estoppel in this proceeding, the hearing judge also bound respondent to and relied upon the evidentiary record in the James lawsuit to find, at least, the former rule 3-300 violations, the nature and extent of the section 6106 violation, and various aggravating circumstances. The hearing judge bound respondent to and relied upon the civil record without giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in that record. In addition, on the basis that respondent was bound to the civil record, the hearing judge precluded respondent form fully cross-examining OCTC's witnesses during the discipline phases of the trial and from fully presenting his (i.e., respondent's) mitigation evidence.

---

[2] Unless otherwise indicated, all future references to former rules are to these former rules.

[3] Unless otherwise indicated, all future references to sections are to sections of the Business and Professions Code.

[4] OCTC also charged respondent with violating section 6068, subdivision (o)(1), which requires attorneys to report, to the State Bar, the filing of three or more lawsuits against them for legal malpractice in a twelve-month period. However, the hearing judge found that OCTC failed to establish such a violation. We agree, and accordingly, adopt that finding, but also dismiss the charge with prejudice (Rules Proc. Of State Bar, title II, State Bar Court Proceedings, rule 261(a)).

Respondent raises numerous contentions challenging the propriety of the disciplinary trial and attaching the hearing judge's decision and discipline recommendation. We summarize respondent's contentions into the following categories. First, respondent contends that it is inappropriate to apply, in this disciplinary proceeding, principles of collateral estoppel with respect to the judgment in the James lawsuit. Next, respondent contents that even if those principles can be appropriately applied in this proceeding, their application neither establishes that he violated former rule 3-300 and section 6106 nor justifies the hearing judge's action in binding him to the evidentiary record in the James lawsuit. Then, respondent contends that the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial and from fully presenting his mitigation evidence. Finally, respondent contends that he was denied due process because the hearing judge was not impartial since his judicial salary is paid by the State Bar.

On review OCTC asserts that all of respondent's contentions are meritless. In addition, it asserts that the hearing judge erred in not recommending respondent's disbarment.

After independently reviewing the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we conclude that principles of collateral estoppel can properly be applied in this proceeding and that their application establishes that respondent engaged in acts of moral turpitude in violation of section 6106. However, under the circumstances and record in this proceeding, the application of those principles does not establish the nature and extent of those acts. Nor does the application of those principles establish that respondent violated former rule 3-300.

Moreover, we agree with respondent's contentions that the hearing judge erred in binding respondent to and relying upon the evidentiary record in the James lawsuit to make, at a minimum, his findings regarding the nature and extent of the found former rule 3-300 and section 6106 violations and various aggravating circumstances without giving respondent an opportunity to contradict, temper, or explain the evidence in that civil record. We also agree with respondent's contentions that the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial and in precluding respondent from fully presenting his mitigating evidence. On the other hand, we reject respondent's contention challenging the impartiality of the hearing judge.

Because the application of collateral estoppel principles neither establishes the nature and extent of respondent's acts of moral turpitude in violation of section 6106 nor the former rule 3-300 violations found by the hearing judge and because the hearing judge erred in binding respondent to the evidentiary record in the James lawsuit without giving respondent an opportunity to attempt to contract, temper, or explain that evidence, we must reverse the hearing judge's findings regarding the nature and extent of respondent's section 6106 violation as well as the hearing judge's findings that respondent violated former rule 3-300. Moreover, because the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trail and from fully presenting his mitigating evidence, we must reverse the hearing judge's aggravation and mitigation findings.

Notwithstanding the foregoing reversals, we adopt the hearing judge's factual findings and legal conclusion that respondent violated section 6068, subdivision (o)(2).

Because we reverse most of the hearing judge's findings, we must also vacate his discipline recommendation and remand this matter for a new trial on all issues except the issues of respondent's culpability for violating section 6106, which we hold has been established under principles of collateral estoppel, and for violating section 6068, subdivision (o)(2), which we hold has been established by clear and convincing evidence independent of the application of collateral estoppel. Finally, in light of our order vacating the hearing judge's discipline recommendation and remanding the matter for further proceedings, OCTC's contention that the hearing judge erred in not recommending that respondent be disbarred is moot and, therefore, not addressed.

I. Preliminary Factual Matters and Procedural History

In December 1991 James gave respondent $61,000 for investment purposes. One investment was in the amount of $7,000; the other investment was in the amount of $54,000. The disciplinary charges against respondent deal only with the $54,000 investment. The $54,000 investment was in a loan secured by a deed of trust on real property used as a dance studio in Studio City, California. That loan went into default and the deed of trust that was to secure it was extinguished by a superior trust deed. Accordingly, James lost all of her $54,000 investment and, as noted above, sued respondent.

James filed her lawsuit in 1993 and sued not only respondent, but also respondent's law partners and others. She sued them for, among other things, violating California and federal securities laws, legal malpractice, fraud, and breach of fiduciary duty. After trial in July 1994, the jury found respondent liable to James on each of James's causes of actions. The jury found, by a preponderance of the evidence, that respondent breached his fiduciary duties to James, that respondent defrauded James, and that, as a result of each of these wrongful acts, James incurred actual damages. The jury additionally found, by clear and convincing evidence, that respondent was guilty of oppression, malice, or fraud with respect to his breach of fiduciary duty or fraud.

Judgment was ultimately entered for James on her breach of fiduciary duty claim because it was the claim on which the jury awarded the most damages. In addition, because the jury found that respondent was guilty of oppression, malice, or fraud by clear and convincing evidence, judgment was also entered for James on her claim for punitive damages. (Civ.Code, section 3294 [under 1987 amendments to this statute, punitive damages may be recovered in cases involving the breach of an obligation not arising in contract when it is proved by clear and convincing evidence that the defendant is guilty of oppression, malice, or fraud].) The jury awarded James $180,800 on her breach of fiduciary duty claim and $61,200 on her claim for punitive damages. After these two awards totaling $242,000 were increased to include prejudgment interest and reduced to give respondent credit of the settlement proceeds James received from respondent's law partners, a final judgment in the amount of $217,235.10 plus an additional $4,281.31 in costs was entered against respondent and in favor of James.

Respondent appealed the judgment on the sole ground that the evidence was insufficient to support the jury's findings. The court of appeal disagreed and affirmed the judgment. Thereafter, the California Supreme Court rejected respondent's request to file an untimely petition for review. Similarly, the United States Supreme Court denied respondent's application for an extension of time to file a petition for a writ of certiorari. At that time, the judgment became final.

In July 1997 OCTC filed a motion in limine in the hearing department. In that motion OCTC sought an order precluding respondent from relitigating those issues that were previously litigated and found against him by clear and convincing evidence in the James lawsuit. The hearing judge granted OCTC's motion. Respondent sought interlocutory review of the hearing judge's order. We denied that petition because no abuse of discretion or error of law was shown. In our order denying respondent's petition, we specifically pointed out that collateral estoppel applies only to those issues that the jury in the James lawsuit found by clear and convincing evidence.

Thereafter, in April 1998, the hearing judge filed an order clarifying how the principles of collateral estoppel would be applied in this disciplinary proceeding. In his clarification order, the hearing judge correctly pointed out to the parties that the application of principles of collateral estoppel with respect to prior civil findings does not modify the fundamental requirement that, to establish a disciplinary violation, OCTC must prove each element of a charged violation by clear and convincing evidence. Thus, as the hearing judge correctly noted, the application of collateral estoppel will establish an element of a charged disciplinary violation only if that same element was previously found by the jury in the James lawsuit by clear and convincing evidence. As the hearing judge also correctly noted, if an element of a charged violation was not previously found by the jury by clear and convincing evidence, OCTC would be required to establish that element in this proceeding with clear and convincing evidence independent of the principles of collateral estoppel.

Notwithstanding the admonitions in our order denying respondent's petition for interlocutory review and the hearing judge's clarification order regarding the principles of collateral estoppel in this proceeding, OCTC attempted to establish the charged former rule 3-300 and section 6106 violations solely through the application of principles of collateral estoppel without presenting any references to the record or analysis showing where and how each element of the charged violation were found by the jury in the James lawsuit by clear and convincing evidence.[5] Instead, OCTC left it to the hearing judge to glean through the voluminous documents that it introduced into evidence and determine whether each element of the charged violations were found by the jury by clear and convincing evidence.

---

[5] OCTC did file, in the hearing department, two pleadings containing summaries and references to portions of the testimony and some of the exhibits in the James lawsuit. However, those references were only to

The voluminous documents OCTC introduced into evidence included copies of (1) the superior court's file in the James lawsuit (including the jury instructions and special verdicts, the judgment, the transcript of the trial, and the exhibits); (2) the court of appeal's opinion in the James lawsuit, and its order denying respondent's petition for rehearing; (3) a letter from the California Supreme Court refusing respondent's request for permission to late file a petition for review of the James lawsuit judgment; and (4) a letter from the United States Supreme Court denying respondent's request for an extension of time to file a petition for a writ of certiorari for review of the James lawsuit judgment.

After it introduced the foregoing documents, OCTC presented the testimony of a State Bar attorney with respect to the charged section 6068, subdivision (o)(2) violation. That attorney testified that respondent did not report, to the State Bar, the entry of the civil judgment against him the James lawsuit. Respondent cross-examined that witness, and OCTC then rested.

Respondent was then permitted to make an opening statement and to call one witness to testify. That witness is a former owner of the dance studio property that was to have been the collateral (under a third deed of trust) securing James's $54,000 investment/loan. That witness testified as to the improvements he made to the dance

---

various portions of the civil record that OCTC believed to be of particular importance or relevance in this proceeding and not to the record references needed for the proper application of collateral estoppel .

studio and the studio's fair market value. When respondent attempted to testify in his own defense and to present exculpatory evidence as to the adverse jury findings, OCTC objected. The hearing judge sustained OCTC's objection and precluded respondent from presenting any other evidence with respect to the former rule 3-300 and section 6106 violations on the ground that he had previously granted OCTC's motion in limine to preclude respondent, under principles of collateral estoppel, from "retrying" the James lawsuit in this disciplinary proceeding.

The hearing judge gave the parties permission to file written closing statements and briefs on the issue of culpability. Thereafter, the hearing judge made tentative findings that respondent was culpable of misconduct, but did not specify the charges on which he found respondent culpable.[6] The hearing judge then scheduled a date for the disciplinary portion of the trial to begin.

During the disciplinary portion of the trial, OCTC presented its aggravating evidence first. OCTC had James testify as to the significant harm she suffered from respondent's misconduct. (Rule Proc. of State Bar, Title IV, Stds. For Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(iv) [harm aggravation].) OCTC also had James testify as to respondent's alleged misrepresentations to her regarding the terms of the transaction/loan and when he would return her $54,000 investment/loan to her. (Std. 1.2(b)(iii) [misconduct surrounded by dishonesty or bad faith aggravation].) The hearing judge precluded respondent from fully cross-examining James on the stated basis that he was not going to permit respondent to go into the facts of or retry the James lawsuit in the discipline phase of the trial.

---

[6] Respondent argues at some length that the hearing judge's failure to specify his culpability findings before the discipline phase of the trial prevented respondent from being able to adequately prepare for the discipline phase of the trial. Because we reverse the hearing judge's findings as to aggravating and mitigating circumstances and remand for a new trial on those issues, respondent's contention is moot and, therefore, not addressed.

OCTC also presented the testimony of Evan Borges, who was James's attorney in the James lawsuit. Attorney Borges testified that respondent lacks remorse over and an adequate understanding of the seriousness of his (i.e., respondent's) misconduct with respect to James. During respondent's cross-examination of attorney Borges, the hearing judge precluded respondent from going into any area that respondent asserted as a defense in the James lawsuit.

After OCTC presented its aggravation evidence, respondent presented his mitigation evidence. First, respondent testified on his own behalf. He gave a general overview of his extensive experience in dealings with loans secured by second and third deeds of trust on real property. When respondent attempted to testify as to his state of mind and his alleged good faith in dealing with James (std. 1.2(e)(ii) [good faith mitigation]), the hearing judge would not let respondent proceed. In addition, the hearing judge would not let respondent testify as to any aspect of his prior dealings or transactions with James on the stated basis that they were covered in the James lawsuit. The hearing judge also concluded that such testimony was not "a proper subject of mitigation evidence."

Second, respondent called three character witness. (Std. 1.2(e)(vi) [good character mitigation].) These witnesses all testified that they believed respondent to be of good character. Next, respondent pointed out to the hearing judge that he had additional evidence in mitigation, but that it was not "admissible" under the hearing judge's rulings on the application of collateral estoppel. Respondent did not, however, make an offer of proof as to what that additional evidence would have been.

After respondent presented his three character witnesses, OCTC presented the testimony of two rebuttal witnesses. Both of these rebuttal witnesses testified that they did not believe to be of good character. Thereafter, the parties rested.

The hearing judge permitted the parties to file written closing statements. Subsequently, the hearing judge filed his decision. In his decision the hearing judge made extensive findings of fact regarding respondent's dealings with James. In addition, as we noted above, the hearing judge found respondent culpable of committing three violations of former rule 3-300, committing acts involving moral turpitude in violation of section 6106, and failing to report the adverse judgment in the James lawsuit to the State Bar in violation of section 6068, subdivision (o)(2). Finally, the hearing judge's decision and his evidentiary rulings at trial establish that he reweighed the evidence in the record in the James lawsuit under the clear and convincing standard of proof applicable to attorney disciplinary proceedings and then relied upon that evidence to make his factual findings regarding the former rule 3-300 and section 6106 violations and various aggravating circumstances without giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in that record.

II. Principles of Collateral Estoppel

Principles of collateral estoppel may be applied to preclude an attorney from relitigating, in the State Bar Court, "an issue that was actually litigated and resolved adversely to [the attorney] in a prior civil proceeding, provided (1) that the issue resulting in the civil finding is substantially identical to the issue in the State Bar Court, (2) that the civil finding was made under the same burden of proof applicable to the substantially identical issue in the State Bar Court, (3) that the [attorney] was a party to the civil proceeding, (4) that there is a final judgment on the merits of the civil proceeding, and (5) that no unfairness in precluding relitigation of the issue is demonstrated by the [attorney]. [Citation.]" (*In the Matter of Applicant A* (Review Dept, 1995) 3 Cal.State Bar Ct. Rptr. 318, 329; see also *In the Matter of Berg* (Review Dept. 1997) 3 Cal.State Bar Ct. Rptr. 725, 731.)

Furthermore, in order for a civil finding to be given preclusive effect under collateral estoppel principles, it must have been necessary to the civil judgment (*McMillin Development, Inc. v. Home Buyers Warranty* (1998) 68 Cal.App.4th 896,906.) "This requirement 'prevent[s] the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." [Citation.] The requirement 'is necessary in the name of procedural fairness, if not due process itself. . . .' [Citation.]" (*Ibid.*)

The application of collateral estoppel principles in attorney disciplinary proceedings, does not alter the fundamental requirement that OCTC prove each element of a charged violation by clear and convincing evidence. (*Golden v. State Bar* (1931) 213 Cal. 237, 274.) Nor does the application of those principles alter the requirement that OCTC prove each element of an aggravating circumstance by clear and convincing evidence. (Std. 1.2(b); *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 933.)

The application of collateral estoppel principles can be applied only to preclude a respondent attorney from relitigating, in the State Bar Court, an issue (i.e., fact) that was previously decided against him in a civil proceeding under the clear and convincing burden of proof. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At p. 329.) Thus, if a factual element of a disciplinary violation or an aggravating circumstance has not previously been found against the respondent by clear and convincing evidence in a prior civil proceeding, OCTC must prove that element in the State Bar Court with clear and convincing evidence independent of the application of collateral estoppel. To prove such an element, OCTC may choose to rely, in whole or in part, upon the record in the prior civil proceeding as evidence.

Contrary to respondent's contention, the relevant testimony of a witness given in a prior civil proceeding is admissible in State Bar Court disciplinary proceedings without regard to the availability of the witness (sec 6049.2) and is to be reconsidered and weighed by the State Bar Court as though the witness were present and testifying before it (cf. Evid. Code sec. 312 [the finder of fact determines the weight and credibility of witnesses including hearsay declarants]; Code Civ. Proc., sec 2025, subd. (u) [deposition testimony must be considered as if it were given in court during trial]). Moreover, under Evidence Code section 452, subdivision (d), the State Bar Court can take judicial notice of the non-testimonial matters (i.e., the pleadings, exhibits, jury findings, and other court documents) in a civil action that involves the course of conduct underlying the disciplinary charges against an attorney. (*Rosenthal v. State Bar* (1987) 43 Cal.3d. 612, fn. 11, 633-634, citing *Caldwell v. State Bar* (1975) 13 Cal.3d 488, 496-497; *Yokozeki v. State Bar* (1974) 11 Cal.3d 436,444.)

Whether OCTC chooses to rely, in whole or in part, upon the record in a prior civil proceeding (whether testimonial evidence, non-testimonial matters, or both) to prove one or more elements of a disciplinary violation or an aggravating circumstance independent of the application of collateral estoppel, the evidence in the civil record as well as any factual findings made by the jury or the judge in the civil proceeding cannot be judicially noticed as conclusive or otherwise given preclusive effect in the State Bar Court, but must be assessed independently by the State Bar Court under the clear and convincing standard of proof applicable in attorney disciplinary proceedings. (*In the Matter of Applicant A., supra*, 3 Cal. State Bar Ct Rptr. At pp. 324-325, citing *Rosenthal v. State Bar, supra,* 43 Cal.3d at pp. 619-620, 634 and *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 949-950, 947.) Moreover, contrary to OCTC's contentions, admissions made by a respondent attorney in a prior civil proceeding are not conclusive and cannot be given preclusive effect in the State Bar Court independently of the application of collateral estoppel even if they are admissible as party admissions under Evidence Code section 1220 (*Aronow v. LaCroix* (1990) 219 Cal.App.3d 1039, 1053.) Only final judgments and orders have preclusive effect. (*Ibid.*) Such party admissions must still be independently assessed under the clear and convincing standard of proof.

Finally, whatever OCTC chooses to rely, in whole or in part, upon the record in a prior civil proceeding to prove one or more element of a disciplinary violation or an aggravating circumstance independent of the application of collateral estoppel, the respondent must always be given a fair opportunity, in the State Bar Court, to contradict, temper, or explain the evidence in the civil record with other evidence, including live testimony from the same witnesses who testified in the civil proceeding. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At pp 324-325, and cases there cited.) But the respondent need not be given free reign to completely retry the civil suit in the State Bar Court with the identical evidence presented in the civil proceeding. As always, the hearing judge retains the discretion to restrict or exclude cumulative evidence. (*In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 226 [hearing judge may exclude cumulative evidence]; see also Evid. Code, sec 352 [judge may exclude evidence if its probative value is outweighed by the probability that its admission will necessitate the undue consumption of time]; *Dixon v. State Bar* (1982) 32 Cal.3d 728, 736 [hearing department has discretion to exercise reasonable control over evidence in order to avoid an unnecessarily long trial].)

III. Discussion

A. Section 6106 and Former Rule 3-300

For the reasons stated below we hold: that the principles of collateral estoppel can properly be applied in this proceeding; that their application establishes that respondent committed acts involving moral turpitude in violation of section 6106; but does not establish the nature and extent of those acts. We further hold the application of those principles does not establish that respondent violated former rule 3-300.

There is no dispute that respondent was a party to the James lawsuit and that the judgment in the James lawsuit is a final judgment on the merits. Furthermore, other than making a general claim that it would be unfair to apply principles of collateral estoppel against him in this proceeding, respondent did not specifically identify any such unfairness. Respondent did not show that he had less incentive to litigate the issues in the James lawsuit, that the jury findings in the James lawsuit are inconsistent with the findings in another judicial proceeding, or that he was required to litigate under less advantageous procedures in the James lawsuit (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At 329, citing *Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 222; see also Rest.2d Judgments, sec 28 [listing various exceptions to the general rule of issue preclusion].) Accordingly, to determine whether principles of collateral estoppel can properly be applied in this proceeding, we must first determine whether there are any issues that are common to the James lawsuit and the present disciplinary proceeding. If there are, we must determine whether they were previously adjudicated against respondent by the jury in the James lawsuit under the clear and convincing standard of proof and whether they are necessary to support the civil judgment against respondent. If there are any issues meeting these requirements, we can give them preclusive effect and use them in this proceeding to find the corresponding element or elements of the charged disciplinary violations or alleged aggravating circumstances.

Our independent review of the record in the James lawsuit discloses that the only common issues that were found against respondent by the jury under the clear and convincing standard of proof and that are necessary to support the judgment in that lawsuit are those issues that the jury found when it unanimously answered "yes" to special finding 10.[7] Special finding 10 asked the jury whether it found "by clear and convincing evidence that [respondent] was guilty of malice, oppression or fraud in the conduct upon which [it based its] finding of liability for either breach of fiduciary duty or fraud."[8]

---

[7] With respect to special finding 10, the jury was instructed that "[I]f you find that [James] suffered actual injury, harm, or damage caused by [respondent's] breach of fiduciary duty or fraud, you must decide in addition whether by clear and convincing evidence you find that there

Because the superior court used the disjunctive conjunction "or" in the phrase "malice, oppression or fraud" in special finding 10, we cannot determine whether the jury found respondent guilt of (1) malice, (2) oppression, (3) fraud, or (4) some combination of malice, oppression, and fraud when it answered "yes" to that special finding. (Compare *In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. At p.330 [where the civil

---

was oppression, malice or fraud in the conduct on which you base your finding of liability." Because the jury found that James suffered actual damages as the result of respondent's breach of fiduciary duty and fraud, it went on to answer special finding 10.

[8] The jury was instructed to use the following definitions when answering special finding 10 (all of the original internal brackets in the following definitions have been omitted as unnecessary).

"'Oppression'means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of the that person's rights."

"'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others. A person acts with conscious disregard of the rights of others when he [or] she is aware of the probable dangerous consequences of his [or] her conduct and willfully and deliberately fails to avoid those consequences." (Brackets added.)

"'Despicable conduct' is conduct which is so vile, contemptable, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people."

"'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

judgment recites that the jury found Applicant A guilty of fraud by clear and convincing evidence]; *In the Matter of Berg, supra*, 3 Cal. State Bar Ct. Rptr. At p. 730-732 [where the civil jury found, by clear and convincing evidence, that Berg guilty of oppression, malice, and fraud with respect to his submitting false bills to an insurance company].) Similarly, because the superior court used the disjunctive correlative conjunction of "either. . .or" in the phrase "either breach of fiduciary duty or fraud" in special finding 10, we cannot determine whether the jury found that respondent was guilty of "malice, oppression or fraud" with respect to (1) his breach fiduciary duty to James, (2) his commission of fraud on James, or (3) both when it answered "yes" to that special finding. Nevertheless, as discussed below, we conclude that the commission of any or all of these acts involves moral turpitude in violation of section 6106, but that their commission does not establish that respondent violated former rule 3-300.

1. Section 6106

Section 6106 provides that an attorney's "commission of any act involving moral turpitude. . ., whether committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Moral turpitude has long been defined as an act "of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97.) "It has been described as any crim or misconduct without excuse [citation] or any dishonest or immoral act. The meaning and the test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all." (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.)

Moreover, "'[c]onduct which indicates that an attorney is unable to meet the professional and fiduciary duties of his practice may show him or her to be unfit to practice and constitute moral turpitude. [Citation.]" (*In re Strick* (1983) 34 cal.3d 891,901.) Thus, an attorney's deliberate breach of a fiduciary duty to a client involves moral turpitude as a matter of law. Further, even an attorney's non-deliberate breach of a fiduciary duty to a client involves moral turpitude if the breach occurred as a result of the attorney's gross carelessness and negligence. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 478.) Furthermore, an attorney's deliberate breach of a fiduciary duty or a breach resulting from the attorney's gross carelessness and negligence involves moral turpitude even in the absence of an attorney-client relationship. That is because "[a]n attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal professional whether or not he acts in his capacity of an attorney." (*Worth v. State Bar* (1976) 17 Cal.3d 337, 341; see also *Beery v. State Bar* (1987) 43 Cal.3d 802, 813.)

In light of the foregoing well-established law regarding moral turpitude, we conclude that an attorney's guilt of malice, oppression, or fraud, as those terms were defined for the jury in the James lawsuit, with respect to the attorney's breaching a fiduciary duty to either a client or a non-client involves moral turpitude in violation of 6106 as matter of law. Similarly, we conclude that an attorney's guilt of malice, oppression, or fraud with respect to his commission of an act of fraud, even in the absence of a fiduciary relationship, involves moral turpitude as a matter of law. (*In re Hallinan* (1954) 43 Cal.2d 243, 247-248

["Although the problem of defining moral turpitude is not without difficulty (citations), it is settled that whatever else it may mean, its includes fraud. . . .(Citations.) It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude. (Citations.)].) Accordingly, we hold that, under the final judgment in the James lawsuit, the jury's answer to special issue 10 is a conclusive legal determination by clear and convincing evidence that respondent committed acts involving moral turpitude in his dealings with James and that that legal determination is binding on respondent and preclusive in this proceeding under principles of collateral estoppel. Those acts of moral turpitude establish all the requisite elements of a section 6106 violation.

However, because the superior court used, in special finding 10, the disjunctive conjunction "or" in the phrase "malice, oppression or fraud" and the disjunctive correlative conjunction "either. . .or" in the phrase "either breach of fiduciary duty or fraud," we cannot determine the factual basis for the jury's unanimous answer of "yes" to special finding 10. Because we cannot determine the factual basis for the jury's answer to special finding 10, 23 cannot determine the nature and extent of respondent's acts involving moral turpitude under the application of collateral estoppel principles. Nor can we determine the nature and extent of those acts by independently reviewing the record.

Even though the hearing judge properly admitted and judicially noticed the record in the James lawsuit (sec. 6049.2; Evid. Code, sec. 452, subd. (d)), he erred in relying upon it as evidence independent of the application of collateral estoppel principles (i.e., by reweighing the evidence in the civil record under the clear and convincing standard of proof) without first giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in it. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At pp. 324-325, and cases there cited.) We, therefore, must reverse the hearing judge's factual findings regarding the section 6106 violation. What is more, because the hearing judge did not give respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in the record in the James lawsuit, we cannot exercise our authority to independently review and reweigh the evidence in that civil record under the clear and convincing standard of proof to determine the nature and extent of respondent's acts of moral turpitude.

We find no merit to respondent's contention that the term "moral turpitude" in section 6106 is unconstitutionally vague. "It is well established that 'one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." [Citation.]" (*In re Kelley* (1990) 52 Cal.3d 487, 497.) Thus, even assuming for the same of argument that the term "moral turpitude" in section 6106 is so broad that people of common intelligence must guess at its meaning, we could not sustain respondent's vagueness challenge because respondent's misconduct as found by the jury in its answer to special finding 10 falls clearly within the scope of section's 6106 proscription of acts involving moral turpitude. (*Ibid.*) Therefore, the term "moral turpitude" as used in section 6106 is not impermissibly vague as applied to respondent in this proceeding.

2. Former Rule 3-300

The requisite elements of a former rule 3-300(A) violation are that the transaction is unfair to the client or that the attorney failed to fully disclose and transmit the terms of the transaction to the client in writing in a manner that the client should be able to understand. The requisite elements of a former rule 3-300(B) violation are that the attorney failed to advise the client in writing that the client may seek the advice of an independent attorney of the client's choice or that the attorney failed to give the client a reasonable opportunity to seek such independent advice. None of these elements was expressly addressed in special finding 10, which, as noted above, inquired of the jury whether it found "by clear and convincing evidence that [respondent] was guilty of malice, oppression or fraud in the conduct upon which [it based its] finding of liability for either breach of fiduciary duty or fraud." Furthermore, none of the elements of a former rule 3-300 violation are expressly addressed in the definitions given to the jury with respect to special finding 10, which definitions are quoted above in footnote 10. Thus, the application of collateral estoppel principles does not establish that respondent violated former rule 3-300.

Moreover, in making his factual findings regarding the former rule 3-300 violations, the hearing judge erred in reweighing the evidence in the James lawsuit under the clear and convincing standard of proof without first giving respondent an opportunity to attempt to contradict, temper, or explain that evidence. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 324-325, and cases there cited.) Because of that error, we cannot exercise our authority to independently review and reweigh the evidence in the James lawsuit under the clear and convincing standard of proof and make our own findings with respect to the charged former rule 3-300 violations.

In sum, we reverse the hearing judge's factual findings and legal conclusions that respondent violated former rule 3-300 and remand the matter for a new trial with respect to the charged former rule 3-300 violations.

In sum, we reverse the hearing judge's factual findings and legal conclusions that respondent violated former rule 3-300 and remand the matter for a new trial on the issue of respondent's culpability on the charged former rule 3-300 violations.

B. Section 6068, subdivision (o)(2)

Respondent does not challenge the hearing judge's factual findings showing that respondent failed to report, to the State Bar, the entry of the judgment against him in the James lawsuit. Nor does respondent challenge the hearing judge's culpability conclusion that respondent's failure to report the judgment violated section 6068, subdivision (o)(2). After independently reviewing the record, we agree with the hearing judge and adopt his factual findings and culpability conclusion regarding this charge.

C. Aggravating and Mitigating Circumstances

Aggravating and mitigating circumstances are events or factors surrounding the particular misconduct of which an attorney has been found culpable that show that a greater or lesser degree of sanction is warranted. (Stds. 1.2(b) & 1.2(e).) In that regard, aggravating and mitigating circumstances are often directly related to or dependent upon the specific misconduct found to have been committed. (See, e.g., std. 1.2(b)(ii) [found misconduct evidences multiple bad acts]; std. 1.2(b)(iii) [found misconduct surrounded or followed by bad faith]; std. 1.2(e)(ii)[good faith of attorney]; std. 1.2(e)(vii) [objective steps take by attorney to atone for consequences of the found misconduct].) Accordingly, because we have reversed most of the hearing judge's findings and conclusions regarding respondent's culpability, we also reverse the hearing judge's findings as to aggravating and mitigating circumstances. We do so in order to provide both parties with an adequate opportunity to present their aggravating and mitigating evidence with respect to whatever particular misconduct may be found on remand.

In any event, for the reasons stated above, the application of collateral estoppel principles does not provide support for the hearing judge's aggravation fidings. As with culpability, in making some of his findings in aggravation, the hearing judge reweighed the evidence in the James lawsuit without first giving respondent an opportunity to contradict, temper, or explain the adverse evidence. In addition, the hearing judge did not give respondent an opportunity to present all of his relevant mitigating evidence. These errors also require that we reverse the hearing judge's findings regarding aggravating and mitigating circumstances and preclude us from exercising our authority to independently reweigh the evidence.

D. The Hearing Judge was Impartial

Finally, we address one remaining issue raised by respondent because it is germane to further proceedings in the hearing department on remand. Under the most generous of readings, we construe respondent's contention regarding the hearing judge's impartiality as arguing that the hearing judge was not impartial because the State Bar pays his judicial salary as mandated under section 6079.1, subdivision (d) and because the State Bar was in a funding crisis as a result of the governor's veto of the State Bar's fee bill in 1997. Respondent does not contend and cite to the place in the record where he timely filed a motion seeking to disqualify the hearing judge on these grounds as required by rule 106 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, and where that motion was denied. By not properly raising this issue, respondent has waived any error. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 302(a); State Bar Court Rules of Practice, rule 1320; *In the Matter of Berg, supra*, 3 Cal. State Bar Ct. Rptr. at p. 736.) Nonetheless, we exercise our discretion and address respondent's arguments on the merits in the interest of justice.

We have repeatedly rejected as meritless arguments that a hearing judge is not impartial because the State Bar pays the judge's statutorily mandated salary. (See, e.g., *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 500-501; *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, 59.) Moreover, the fact that the State Bar might use a portion of the costs that it recovers from disciplined attorneys to pay the hearing judge's salary does not create a disqualifying condition. That is primarily because the vast majority of all costs recovered are recovered in accordance with a Supreme Court disciplinary order (not a State Bar Court order) that includes an award of costs to the State Bar in accordance with the statutory provision for costs in section 6086.10 (CF. *In re Rose* (2000) 22 Cal.4th 430, 439, citing *In re Attorney Disciplinary System* (1998) 19 Cal.4th 582, 600-601 [before the Supreme Court issues disciplinary order, it exercises its independent and inherent jurisdiction over attorney discipline and independently determines whether to impose the discipline recommended by the State Bar Court].) Respondent cannot plausibly contend that the Supreme court's independent and statutory award of costs to the State Bar, even if made on the recommendation of the State Bar Court, creates a condition disqualifying the State Bar Court. (Accord *In the Matter of Stewart, supra,* 3 Cal. State Bar Ct. Rptr. at p. 59.)

The only instance in which the State Bar Court can assess costs on disciplined attorneys is in those cases in which the State Bar Court publicly reproves the attorney. (sec. 6086.10, subd. (a).) Respondent was not publicly reproved.

Moreover, the fact that a portion of the hearing judge's salary might conceivably be paid from part of the costs the State Bar recovers from disciplined attorneys does not create a disqualifying condition because the amount of costs actually recovered are relatively nominal to the State Bar's budget. (*In the Matter of Acuna, supra*, 3 Cal. State Bar Ct. Rptr. at p. 501, fn.2; compare *Ward v. Village of Monroeville, Ohio* (1973) 409 U.S. 57, 60 [where the mayor of Monroeville was disqualified from acting as the judge in ordinance and traffic violation cases because the fines and costs recovered for ordinance and traffic violations made up a major portion of the village's income and because the mayor had executive authority over the village's finances].)

Finally, we also reject as meritless respondent's argument that the hearing judge was not impartial because the State Bar was in a funding crisis in 1998 during part of the trial in this matter and while this matter was under submission for a decision by the hearing judge. Throughout the State Bar's funding crisis in 1998 and early 1999, the State Bar Court Judges voluntarily agreed to temporarily receive a reduced salary from the State Bar. (*In re Attorney Disciplinary System, supra*, 19 Cal.4th at p. 614.) We fail to see how such a voluntary reduction in salary to permit the State Bar to operate within its budgetary constraints under rule 963 of the California Rules of Court could have plausibly created a financial interest that would have required the recusal of the hearing judge.

IV. Remand Order

Applying principles of collateral estoppel, we conclude that respondent Bolden Bruce Kittrell is culpable of violating Business and Professions Code sections 6106. Moreover, adopting the hearing judge's findings of fact and conclusions of law with respect to the charged violation of Business and Professions Code section 6068, subdivision (o)(2), we conclude that respondent is culpable of that charged violation.

In light of the foregoing conclusions and our reversal of most of the hearing judge's findings and conclusions, we order that this matter be remanded to the hearing department for a new trial on the following issues: (1) findings of fact surrounding respondent's violation of Business and Professions Code section 6106; (2) findings of fact and conclusions of law regarding the charged violations of rule 3-300 of the former Rules of Professional Conduct of the State Bar; (3) findings of fact and conclusions of law regarding aggravating and mitigating circumstances; and (4) the appropriate level of discipline.

On remand, the evidence shall be reopened as to both parties with respect to the above issues. However, the evidence that is presently part of the record need not be re-introduced. Moreover, the record of the James lawsuit, which is admitted into evidence in the hearing department, may be properly considered on remand by the hearing judge. However, respondent must be given a fair opportunity to contradict, temper, or explain that evidence with other evidence, including live testimony from the same witnesses who testified in the civil proceeding. Yet the hearing judge need not retry the civil suit in this disciplinary proceeding as she or he retains the sound discretion to restrict or exclude cumulative evidence and otherwise control the introduction of evidence as in any other case. The hearing judge's decision on remand should, again as in any other case, be based on a balanced consideration of all the competent evidence admitted, whether documentary, hearsay, live testimony, or other.

NORIAN, J.

We concur:

OBRIEN, P.J.
STOVITZ, J.

James W. Obrien
Presiding Judge

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
MICHAEL G. GERNER
JANICE G. OEHRLE, No. 6715
1149 South Hill Street
Los Angeles, California 90015-2299
Telephone: (213) 765-1000

THE STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
HEARING DEPARTMENT-LOS ANGELES

In the Matter of	)	Case No. 95-0-14321
	)	
BOLDEN BRUCE KITTRELL	)	NOTICE OF
No. 40896	)	DISCIPLINARY
	)	CHARGES
A Member of the State Bar	)	
______________________________	)	

NOTICE – INACTIVE ENROLLMENT:

IF YOU FAIL TO FILE AN ANSWER TO THIS NOTICE WITHIN THE TIME ALLOWED BY STATE BAR RULES, INCLUDING EXTENSIONS, YOU MAY BE ENROLLED AS AN INVOLUNTARY INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE PERMITTED TO PRACTICE LAW UNTIL AN ANSWER IS FILED.

The State Bar of California alleges:

RESPONDENT, BOLDEN BRUCE KITTRELL, ("RESPONDENT") was admitted to the practice of law in the State of California on December 21, 1967, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

It is alleged that RESPONDENT willfully committed the following violations.

GENERAL BACKGROUND ALLEGATIONS

1. In 1986, commercial property in Studio City, California known as the Moro Landis Studios sold for $1,060,000. The seller received $740,00 and took back a second trust deed of $260,000. In 1988, Respondent raised $600,000 from investors in the name of his wholly owned corporation, Bolden Realty and loaned the $600,000 to the then owner of the property in exchange for a promissory note secured by a third deed of trust. Bolden Realty held the third deed of trust in its name for the "convenience" of Respondent's investors. At the time Respondent became involved with the property, it was encumbered by a first trust deed in the amount of $635,000 and a second trust deed in the amount of $260,000.

2. In 1989, the owner of the property defaulted on the first, second and third trust deeds. Thereafter, in December of 1989, Bolden Realty, holder of the third trust deed foreclosed and became owner of the property subject to the first and second trust deeds.

3. Subsequent to 1989, the net operating income generated by the property amounted to approximately $70,000 per year while the debt service on the first and second deeds of trust exceeded $100,000. To gain the funds with which to service these debts, on March 1, 1990, Respondent caused Bolden Realty to issue a $450,000 note secured by a new third deed of trust and commenced the sale of fractional interests in that note to investors.

4. On March 1, 1991, the $450,000 note secured by the new third deed of trust came due. Because of the "down market" and in order to maintain interest payment to existing investors, Respondent extended the note for two years to March 1, 1993, increased the amount of the note to $550,000 and began selling new investments to new investors. In October 1991, the holder of the first trust deed filed a notice of default.

5. On or about November 26, 1991 Czarine Hope James ("James") met with RESPONDENT at his office to discuss the possibility of investing some money. Ms. James was a 59 year old woman with the equivalent of a high school education from Jamaica who had no previous investment experience. She was introduced to Respondent by a friend.

6. While in Respondent's office James also asked for legal advice from RESPONDENT regarding her divorce settlement. RESPONDENT instructed James to send him a copy of her divorce papers and that he would advise her further. James subsequently sent RESPONDENT her divorce papers and RESPONDENT answered James' questions regarding her divorce settlement.

7. At the November 26, 1991 meeting, RESPONDENT offered James the opportunity to invest $54,000 in a fractional interest in the promissory note he had extended on the aforementioned property on March 1, 1991. He advised her that the investment would earn a 14% rate of return, that the interest payments would be paid monthly and that the principal would be paid back in three to four months. RESPONDENT made no other disclosures to James about the investment. During the meeting, James expressed concern to Respondent about the possibility of losing her funds as they consisted of her entire life savings and she was interested in purchasing a condominium in the

near future. Respondent assured James that it was a "good investment."

8. A few days after the meeting, James obtained a cashier's check to send to RESPONDENT for the investment. James was told by RESPONDENT to make the check payable to "Bolden Realty", the borrower of the funds. Respondent did not obtain a current appraisal of the property prior to accepting James funds.

9. On or about January 9, 1992, RESPONDENT sent James a Declaration of Trust and Beneficiary Agreement to execute. Although said Agreement, purported to memorialize James' investment, the true nature of James' investment was not disclosed to her and no mention was made of the risks involved in the investment. In reviewing the document, James noticed that the Agreement provided that the principal of her investment was payable on March 1, 1993, as opposed to the three to four months that RESPONDENT had previously indicated. James telephoned REPONDENT about this discrepancy and was told that she would get her money back in three or four months, and that the March 1, 1993 due date was a mere "convenience" in the event she wanted to reinvest her money after the three or four month period expired. Thereafter, in reliance on RESPONDENT'S representations, James executed the Agreement.

10. In or about late February 1992, James decided to buy a condominium. James telephoned RESPONDENT to request the return of her invested funds. RESPONDENT promised James that he would return her money. Thereby, James entered into escrow for the condominium. However, RESPONDENT did not return James' money as promised, causing her to fall out of escrow and lose the condominium.

11. Thereafter, after RESPONDENT assured James that she would get her money back soon. In reliance on

Respondent's representation, in or about mid-summer 1992 James committed to a second escrow. Again, RESPONDENT failed to return the invested funds to James as he promised, and again, James fell out of escrow.

12. With continued assurance from Respondent that her funds would be returned, in or about mid-fall 1992 James entered into a third escrow to purchase a residence in a senior citizen community. Thereafter RESPONDENT stopped making interest payments on the investment and James fell out of escrow for the third time.

COUNT ONE

Case No. 95-0-14321

Rules of Professional Conduct, rule 3-300(A)

[Adverse Interests]

1. Paragraphs 1 through 12 of the General allegations are incorporated by reference as though set forth in full herein.

2. The investment which Respondent sold to James was a fractional interest in a promissory note in the amount of $550,000.00 secured by a third deed of trust on commercial property which he owned. At the time James made her investment, the property, valued at approximately $1,060,000, was encumbered by a first deed of trust in the amount of $635,000, a second deed of trust in the amount of $260,000 and the third deed of trust in the amount of $550,000 in which James was investing.

3. At the time Respondent offered the investment to James, the annual debt service on the deeds of trust secured by the property approximated $97,200.00 on the first deed of trust, approximated $28,600 on the second deed of trust and approximated $60,000 on the third deed of trust while

the annual net operating income generated by the property amounted to only $70,000.

4. At the time Respondent sold the aforementioned investment to James, he knew or had reason to know that the property was overencumbered and that the property lacked the ability to support the third deed of trust she had invested in.

By accepting the foregoing investment from Ms. James, Respondent entered into a transaction with a client in which the terms were not fair and reasonable to the client in willful violation of rule 3-300(A) of the Rules of Professional Conduct.

COUNT TWO

Case No. 95-0-14321
Rules of Professional Conduct, rule 3-300(A)
[Adverse Interests]

1. Paragraphs 1 through 12 of the General Allegations and paragraphs 2 through 4 of Count One are incorporated by reference as though set forth in full herein.

2. On or about January 9, 1992, RESPONDENT sent James a document entitled Declaration of Trust and Beneficiary Agreement to execute. Although said Agreement, purported to memorialize James' investment, Respondent failed to advise James in writing and in terms that she could reasonably understand that she had invested in a fractional interest in a promissory note in the amount of $550,000.00 secured by a third deed of trust on said property:

1. on which the existing encumbrances exceeded the property market value;

2. on which the net operating income generated by the property was not sufficient to make the debt service

payments and that the only source of funds available to make debt service payments to her and other investors was the further encumbrance of the property and selling her new investments to new investors;

3. on which recent and previous attempts to sell or refinance the property had been unsuccessful; and

4. that said property had a history of previous and current defaults and foreclosures including a foreclosure action initiated as recently as one month previous.

By failing to fully disclose to James in writing the terms of the transaction he had entered with her, Respondent acted in willful violation of rule 3-300(A) of the Rules of Professional Conduct.

COUNT THREE

Case No. 95-0-14321

Business and Professions Code, Section 6106

[Moral Turpitude]

1. Paragraphs 1 through 12 of the General Allegations and Paragraph 2 of Count Two are incorporated by reference as though set forth in full herein.

2. Respondent reasonably know or should have known that the facts concerning the aforementioned investment which he was concealing from James were material to her in making the investment decision and that she needed her funds returned to her in three or four months for investment into a condominium.

By concealing from James, at the time she made the aforementioned investment, the true financial state of the asset into which she was investing her funds, Respondent engaged in an act of moral turpitude as set forth in Business and Professions Code section 6106.

COUNT FOUR

Case No. 95-0-14321
Rules of Professional Conduct, rule 3-300(B)
[Adverse Interests]

1. Paragraphs 1 through 12 of the General Allegations is incorporated by reference as though set forth in full herein.

2. At the time Respondent sold the aforementioned investment to James, he failed to advise her in writing that she could seek the advise of independent counsel prior to making the investment.

3. By failing to advise James in writing that she could seek the advise of independent counsel concerning the investment she was contemplating with Respondent, Respondent acted in willful Rules of Professional Conduct, rule 3-300(B).

COUNT FIVE

Case No. 95-0-14321
Business and Professions Code section 6068(o)(1)
[Failure to Report the Filing of Three Lawsuits]

1. In or about April 1993 a complaint for damages including but not limited to legal malpractice and fraud, was filed against RESPONDENT in that matter entitled Czarine James v. B. Bruce Kittrell, et al, Orange County Superior Court Case No. 70-89-30.

2. On or about July 23, 1993 a complaint for damages, including but not limited to fraud, was filed against RESPONDENT in that matter entitled Kim Howe v. B. Bruce Kittrell, et al, Los Angeles Superior Court Case No. SC 35174.

3. On or about August 11, 1993 a complaint for damages, including but not limited to fraud, was filed against RESPONDENT in that matter entitled Ramon Pacheco v. B. Bruce Kittrel, et al., Los Angeles Superior Court case SC 86219.

4. RESPONDENT did not report the above mentioned complaints filed against him in 1993 to the State Bar of California.

By the foregoing conduct, RESPONDENT willfully violated Business and Professions Code section 6068(o)(1).

COUNT SIX

Case No. 95-0-14321
Rules of Professional Conduct, rule 3-300(B)
[Adverse Interests]

1. On or about November 21, 1994 a jury award was entered with the Court against RESPONDENT for fraud and malpractice in the matter entitled Czarine H. James v. B. Bruce Kittrell, et al, Orange County Superior Court Case no. 708730. RESPONDENT did not report the entry of judgment for fraud to the State Bar of California.

2. RESPONDENT did not carry out his duty as an attorney but failing to report the entry of judgment for fraud entered against him in the above entitled case.

By the foregoing conduct, RESPONDENT willfully violated Business and Professions Code section 6068(o)(2).

NOTICE – DEFAULT PROCEDURE

YOUR DEFAULT MAY BE ENTERED FOR FAILURE TO FILE A WRITTEN RESPONSE TO THIS NOTICE OF DISCIPLINARY CHARGES WITHIN TWENTY (20) DAYS AFTER SERVICE. YOUR DEFAULT MAY ALSO BE ENTERED FOR FAILURE TO APPEAR AT

TRIAL. THE ENTRY OF YOUR DEFAULT MAY RESULT IN THE FACTS SET FORTH IN THIS NOTICE OF DISCIPLINARY CHARGES BEING ADMITTED AND DISCIPLINE RECOMMENDED OR IMPOSED BASED UPON THOSE ADMITTED FACTS. IF YOUR DEFAULT IS ENTERED, YOU WILL LOSE THE OPPORTUNITY TO PARTICIPATE IN ANY WAY IN THE PROCEEDING UNLESS AND UNTIL YOUR DEFAULT IS SET ASIDE ON MOTION TIMELY MADE UNDER THE PRESCRIBED GROUNDS.

NOTICE – INACTIVE ENROLLMENT:

YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO THE PUBLIC, THAT YOU MAY BE INVOLUNTARILY ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE RECOMMENDED BY THE COURT. SEE RULE 101(c), RULES OF PROCEDURE OF THE STATE BAR.

NOTICE – COST ASSESSMENT:

IN THE EVENT THESE PROCEEDURES RESULT IN PUBLIC DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS INCURRED BY THE STATE BAR IN THE INVESTIGATION, HEARING AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6086.10. SEE RULE 280, RULES OF PROCEDURE OF THE STATE BAR.

Respectfully submitted,

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL
COUNSEL

Dated: June 25, 1996
BY:____________________________
JANICE G. OEHRLE
Deputy Trial Counsel